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Representation in Mediation: What We Know From Empirical Research

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REPRESENTATION IN MEDIATION: WHAT WE KNOW FROM EMPIRICAL RESEARCH

*Roselle L. Wissler**

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INTRODUCTION

Across jurisdictions, one or both parties typically are unrepresented¹ in a minority of filed general civil cases (3% to 48%), in a majority of domestic relations cases (35% to 95%), and in most cases in small claims and housing courts (79% to 99%).² Whether unrepresented litigants are able to obtain a fair result in litigation is a major concern, given their lack of information about court forms and processes, lack of knowledge of substantive law and rules of evidence and procedure, and lack of case presentation and negotiation skills.³ Additional concerns are the potential burdens that large numbers of unrepresented parties might pose for court staff and judges.⁴

1. This article uses the term “unrepresented” litigants; comparable terms include self-represented, pro se, and *pro per*.

2. See, e.g., JONA GOLDSCHMIDT ET AL., MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS 8 (1998); JOHN M. GREACEN, SELF REPRESENTED LITIGANTS AND COURT AND LEGAL SERVICES RESPONSES TO THEIR NEEDS 3-8 (2002), available at <http://www.courtinfo.ca.gov/programs/cfcc/pdf/files/SRLwhatwknow.pdf>; NAT'L CTR. FOR STATE COURTS, SELF-REPRESENTATION: PRO SE STATISTICS (2006), available at <http://www.ncsconline.org/wc/publications/memos/prosestatmemo.htm>; Connie J. A. Beck & Bruce D. Sales, *A Critical Reappraisal of Divorce Mediation Research and Policy*, 6 PSYCHOL. PUB. POL'Y & L. 989, 993 (2000); Deborah J. Chase, *Pro Se Justice and Unified Family Courts*, 37 FAM. L.Q. 403, 404-05 (2003); Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1359, 1390-91 (1995); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419, 420-21 (2001). See generally BOSTON BAR ASS'N, REPORT OF THE TASK FORCE ON UNREPRESENTED LITIGANTS (1998), available at <http://www.bostonbar.org/prs/reports/unrepresented0898.pdf>.

3. See ABA TASK FORCE ON ACCESS TO CIVIL JUSTICE ET AL., REPORT TO THE HOUSE OF DELEGATES 3 (2006) [hereinafter ABA TASK FORCE], available at <https://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>; GOLDSCHMIDT ET AL., *supra* note 2, at 52-54, 118; GREACEN, *supra* note 2, at 12; LYNN MATHER ET AL., DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE 43-44, 67 (2001); BRUCE D. SALES ET AL., SELF-REPRESENTATION IN DIVORCE CASES 14 (1993); Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L. J. 105, 115 (2001). See generally BOSTON BAR ASS'N, *supra* note 2. Lists of the tasks lawyers perform when representing clients indicate the skills that non-lawyers lack. See, e.g., HERBERT M. KRITZER, THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION 90-91 (1990) [hereinafter KRITZER, JUSTICE BROKER]; MATHER ET AL., *supra*, at 67; Berenson, *supra*, at 130-31; Alicia M. Farley, *An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants*, 20 GEO. J. LEGAL ETHICS 563, 569-71 (2007); Forrest S. Mosten, *Unbundling: Current Developments and Future Trends*, 40 FAM. CT. REV. 15, 16 (2002); Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1080 (2000). Research has found that even lawyers have difficulties when they litigate cases in settings different than those in which they usually practice. See, e.g., KRITZER, JUSTICE BROKER, *supra*, at 156-57; HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK 201 (1998) [hereinafter KRITZER, LEGAL ADVOCACY]; MATHER ET

Proposals to enhance unrepresented civil litigants' access to meaningful justice can be grouped into three sets. One set recommends that courts do more to facilitate unrepresented litigants' ability to handle their cases themselves, such as by providing instructions, simplified forms, and increased assistance from court personnel or volunteers.⁵ Another set of proposals urges courts to provide alternative dispute resolution ("ADR")

AL., *supra*, at 59. Unrepresented litigants also are more likely than represented litigants to be "one-shotters" or "have nots" and, thus, might also lack other skills and resources. *See, e.g.*, Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, in IN LITIGATION: DO THE "HAVES" STILL COME OUT AHEAD? 13, 15, 22, 27 (Herbert M. Kritzer & Susan S. Silbey eds., 2003); Donald R. Songer et al., *Do the "Haves" Come Out Ahead over Time?*, in IN LITIGATION: DO THE "HAVES" STILL COME OUT AHEAD? 85, 99, 102-103 (Herbert M. Kritzer & Susan S. Silbey eds., 2003).

4. GOLDSCHMIDT ET AL., *supra* note 2, at 52-54; GREACEN, *supra* note 2, at 9-12; Beck & Sales, *supra* note 2, at 993; Berenson, *supra* note 3, at 112-15; Paula Hannaford-Agor & Nicole Mott, *Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations*, 24 JUST. SYS. J. 163, 165 (2003); *see generally* BOSTON BAR ASS'N, *supra* note 2; Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423 (2004).

5. *See, e.g.*, BOSTON BAR ASS'N, *supra* note 2, at 2; CONFERENCE OF CHIEF JUSTICES & CONFERENCE OF STATE COURT ADMINISTRATORS, RESOLUTION II: In Support of a Leadership Role for CCJ and COSCA in the Development, Implementation and Coordination of Assistance Programs for Self-Represented Litigants (Aug. 1, 2002) [hereinafter CCJ/COSCA], available at <http://cosca.ncsc.dni.us/Resolutions/CourtAdmin/resolutionSelfRepresentedLitigants.html>; GOLDSCHMIDT ET AL., *supra* note 2, at 25, 68-71; GREACEN, *supra* note 2, at 13; IOWA JUDGES ASS'N AND IOWA STATE BAR ASS'N, REPORT OF THE JOINT TASK FORCE ON PRO SE LITIGATION 4-9 (2005) [hereinafter IOWA TASK FORCE], available at [http://www.iowabar.org/miscdocuments.nsf/2b85a4ea12f4bfac8625669d006e27ab/2255cb254c1954af8625701b0061fc6f/\\$FILE/Pro%20se%20task%20force%20june%202005.pdf](http://www.iowabar.org/miscdocuments.nsf/2b85a4ea12f4bfac8625669d006e27ab/2255cb254c1954af8625701b0061fc6f/$FILE/Pro%20se%20task%20force%20june%202005.pdf); MASS. ACCESS TO JUSTICE COMM'N, BARRIERS TO ACCESS TO JUSTICE IN MASSACHUSETTS 4-5 (2007) [hereinafter MASS. COMMISSION], available at <http://www.massaccessjustice.org/reports-of-the-commission.php>; N.H. SUPREME COURT TASK FORCE ON SELF-REPRESENTATION, CHALLENGE TO JUSTICE: A REPORT ON SELF-REPRESENTED LITIGANTS IN NEW HAMPSHIRE COURTS 13-18 (2004) [hereinafter N.H. TASK FORCE] available at <http://www.courts.state.nh.us/supreme/prosereport.pdf>; SELF-REPRESENTED LITIGATION NETWORK, BEST PRACTICES IN COURT-BASED PROGRAMS FOR THE SELF-REPRESENTED: CONCEPTS, ATTRIBUTES, AND ISSUES FOR EXPLORATION 3-18 (2006) [hereinafter SRLN], available at http://www.ncsonline.org/WC/Publications/KIS_ProseBestPracticesSRLN.pdf; Berenson, *supra* note 3, at 122-33; Chase, *supra* note 2, at 414-18. For empirical research on the effectiveness of these programs, *see* GREACEN, *supra* note 2, at 13-28; Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37, 81 (2010).

programs, particularly mediation, for unrepresented litigants.⁶ The third set of proposals focuses on increasing the availability of legal representation.⁷

Proposals to expand legal representation generally are silent as to whether they envision providing counsel for ADR proceedings. The ABA proposal does address this issue, but different positions are expressed in different documents. In the report accompanying the ABA resolution, the provision of counsel is limited to fora that occur in the "litigation context" and in which the process is "adversarial."⁸ In another document, however, the recommendation is to provide "a full range of services in all forums" including, among others, "representation in negotiation and alternative dispute resolution."⁹ Thus, the ABA proposal presumably includes providing counsel for adversarial court-connected ADR proceedings like arbitration, although it is not clear whether it extends to "non-adversarial" court-connected ADR proceedings like mediation or neutral evaluation.¹⁰

6. See, e.g., BOSTON BAR ASS'N, *supra* note 2, at 2; MASS. COMM'N, *supra* note 5, at 64; N.H. TASK FORCE, *supra* note 5, at 19-21; Chase, *supra* note 2, at 421-22. These proposals typically cite relaxed rules of evidence and procedure and a less formal setting among the reasons why mediation would be a good forum for unrepresented litigants.

7. Many proposals in this third set aim to accomplish this through increased pro bono work, the unbundling of legal services, or limited-purpose representation. See, e.g., BOSTON BAR ASS'N, *supra* note 2, at 1; CCJ/COSCA, *supra* note 5; GOLDSCHMIDT ET AL., *supra* note 2, at 70; IOWA TASK FORCE, *supra* note 5, at 10-16; MASS. COMM'N, *supra* note 5, at 5-10; N.H. TASK FORCE, *supra* note 5, at 10-12; SRLN, *supra* note 5, at 20-25; Berenson, *supra* note 3, at 122-33; Chase, *supra* note 1, at 415-19. By contrast, the ABA resolution that is the subject of the present Symposium urges the provision of counsel "at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody. . . ." ABA TASK FORCE, *supra* note 3, at 1.

8. ABA TASK FORCE, *supra* note 3, at 13. The ABA's focus on providing counsel in adversarial proceedings is consistent with Reuben's discussion of litigants' qualified right to counsel in ADR, based on his review of Supreme Court decisions: "[a] right to counsel has been held to be a requirement of due process when the hearing is of an adversarial nature . . . but it has not been found to be essential in hearings that are nonadversarial in nature." Reuben, *supra* note 3, at 1079.

9. ABA TASK FORCE ON ACCESS TO CIVIL JUSTICE ET AL., PRINCIPLES OF A STATE SYSTEM FOR THE DELIVERY OF CIVIL LEGAL AID 1 (2006), available at <http://www.abanet.org/legalservices/sclaid/atjresourcecenter/downloads/tencivilprinciples.pdf>.

10. And because the report specifically excludes providing counsel in processes designed primarily for use by unrepresented litigants, such as to resolve small claims and simple uncontested divorces, the ABA proposal presumably does not include providing counsel for any ADR proceedings in those contexts. This apparently is based on the theory that lawyers are often excluded from these fora or are not needed for litigants to "quickly and effectively access legal rights and protections" because judges in these fora "take an active role in developing the relevant facts." ABA TASK FORCE, *supra* note 3, at 13. Empirical research in small claims and housing courts, however, raises serious questions about these assumptions. See, e.g., LAWYERS' COMMITTEE FOR BETTER HOUSING, NO TIME FOR JUSTICE: A STUDY OF CHICAGO'S EVICTION COURT 4 (2003), available at <http://lcbh.org/images/2008/10/chicago-eviction-court-study.pdf>; Engler, *supra* note 5, at 50-51 & n.56; Roselle L.

In practice, however, there is no distinct line between “adversarial” and “non-adversarial” processes. Although the mediation process itself may be considered non-adversarial, it often takes place in the middle of adversarial litigation. In many courts, mandatory mediation is a formal step in the court management of litigation;¹¹ if the parties do not settle in mediation, they are immediately back in the adversarial “litigotiation” process.¹² Just as there is no clear separation between negotiation and litigation, there is no clear separation between mediation and either negotiation or litigation.¹³

The assumption that representation is not needed in mediation appears to underlie proposals that exclude mediation from the processes for which counsel should be provided, as well as proposals that urge courts to provide mediation programs for unrepresented litigants. Existing mediation programs, however, do not necessarily share this assumption. Some court-connected programs routinely exclude cases with unrepresented litigants from mandatory referral to mediation, some refer only certain matters to mediation when one or both parties are unrepresented, and some require lawyers to accompany their clients in mediation.¹⁴ Other programs, however, have mandatory referral to mediation without regard to the parties’ representational status, and a few do not allow lawyers to attend mediation or permit the mediator to exclude lawyers.¹⁵ Thus, different mediation programs appear to have reached different conclusions about the relative benefits and costs of representation versus lack of representation in mediation.

Wissler, *Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics*, 29 LAW & SOC’Y REV. 323, 323-24, 335-37 (1995).

11. See John Lande, *How Will Lawyering and Mediation Transform Each Other?*, 24 FLA. ST. U. L. REV. 839 (1997) (describing the “liti-mediation” culture, where mediation is routinely integrated into litigation practice); Craig A. McEwen & Roselle L. Wissler, *Finding Out If It Is True: Comparing Mediation and Negotiation Through Research*, 2002 J. DISP. RESOL. 131, 132-33 (2002); Roselle L. Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RESOL. Q. 55, 63, 72 (2004).

12. See Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About the Legal Process*, 34 J. LEGAL EDUC. 268 (1984); HERBERT M. KRITZER, *The Lawyer as Negotiator: Working in the Shadows* 2, 5, 15 (Univ. of Wis. Law Sch. Disputes Processing Research Program: Series No. 7, Working Paper No. 4, 1986).

13. Lande, *supra* note 11; see also KRITZER, *supra* note 12, at 19; Jean R. Sternlight, *ADR Is Here: Preliminary Reflections on Where it Fits in a System of Justice*, 3 Nev. L.J. 289, 294-95 (2003).

14. ROBERT J. NIEMIC ET AL., GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR 40 (2001); see also *infra* Part I.A.

15. See *infra* Part I.A.; see also Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 611 (2004) (describing a special education mediation program that permitted non-lawyer advocates to attend mediation but excluded lawyers).

The concerns about unrepresented parties in mediation include many of the same concerns that have been raised about unrepresented parties in litigation and negotiation,¹⁶ plus additional concerns specific to the mediation process. Unrepresented parties might not understand how mediation operates, how it fits into the overall litigation process, or its potential advantages or disadvantages when deciding whether or how to use mediation.¹⁷ Unrepresented parties might not be able to articulate or express their views or concerns during mediation.¹⁸ Mediators' neutrality might be compromised if unrepresented parties seek their advice or support: unrepresented parties might feel the process is unfair if mediators do not assist them, and represented parties might feel it is unfair if they do.¹⁹ Unrepresented parties might view the mediator as a court authority and feel pressured to settle, or they might think that being required to mediate means they are required to settle.²⁰ Unrepresented parties also might not have enough factual or legal information to evaluate the implications of settlement proposals in order to make a fully informed decision and, as a consequence, might accept a settlement that is unfair or does not adequately address their interests.²¹

The effect of the presence of lawyers on the mediation process and outcomes has been debated.²² Lawyers generally are thought to improve the effectiveness of mediation and their clients' mediation experience by preparing them for mediation and advising them on negotiation skills.²³ Some commentators argue that lawyers are essential to ensure the fairness of the mediation process because they equalize power imbalances and counteract settlement pressures; others maintain that mediators can, and in some set-

16. See *supra* note 3 and accompanying text.

17. Ctr. for Dispute Settlement and Inst. for Judicial Admin., NAT'L STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS, § 1.4 & cmt. [hereinafter NAT'L STANDARDS], available at courtdr.org/files/NationalStandardsADR.pdf; NIEMIC ET AL., *supra* note 14, at 56; Beck & Sales, *supra* note 2, at 992; Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 778-80 (1999).

18. Beck & Sales, *supra* note 2, at 1001; Farley, *supra* note 3, at 569.

19. NIEMIC ET AL., *supra* note 14, at 24; Beck & Sales, *supra* note 2, at 1020. A similar concern has been raised regarding judges' impartiality with unrepresented litigants. GOLDSCHMIDT ET AL., *supra* note 2, at 25-32; Zorza, *supra* note 4, at 423-25.

20. NAT'L STANDARDS, *supra* note 17, §§ 1.4, 11.1, 11.2 & cmts; NIEMIC ET AL., *supra* note 14, at 56; Beck & Sales, *supra* note 2, at 1012.

21. NIEMIC ET AL., *supra* note 14, at 56; NAT'L STANDARDS, *supra* note 17 § 1.4 & cmts.; Beck & Sales, *supra* note 2, at 993-94, 1012, 1039-40.

22. See, e.g., NAT'L STANDARDS, *supra* note 17, § 10.2 & cmt.; ALFINI ET AL., *MEDIATION THEORY AND PRACTICE* 412 (2001); Lande, *supra* note 11, at 890.

23. See *infra* Part I.B.1.

tings have a duty to, address these problems.²⁴ Some commentators argue that lawyers are likely to dominate mediation sessions, thereby limiting the parties' direct participation and transforming their discussions; others maintain that lawyers ensure that parties can communicate their concerns and are not silenced by the mediator or the other side.²⁵ Some argue that lawyers make mediation more contentious and thereby reduce opportunities for problem-solving and relationship repair; others maintain that lawyers help keep the parties' emotions in check and improve the tone of the session.²⁶ There is also disagreement about whether lawyers increase or reduce the likelihood of settlement in mediation.²⁷ While some commentators argue that lawyers ensure against uninformed or unfair agreements, others maintain that mediators can help parties assess settlement proposals and, in some settings, have a duty to prevent unfair settlements.²⁸

Given the large proportion of unrepresented litigants and the widespread use of court-connected mediation, it is important to understand what effect representation, or conversely, the lack of representation, has on parties' experiences in mediation as well as the process and its outcomes.²⁹ To date, few empirical studies have examined these questions.³⁰ This Article discusses the existing research findings and presents new data on the effect of representation in mediation.³¹

This Article first describes the proportion of unrepresented parties in mediation and the policies and practices regarding representation in different mediation contexts. The core of the Article examines the empirical findings on the effect of representation on several dimensions of the mediation process, including the effect on preparation for mediation, party perceptions of the fairness of the process and pressures to settle, the extent of party "voice" and participation in mediation, and the tone of the session. In addition, the Article examines the effect of representation on mediation outcomes, including the likelihood of settlement and the fairness of agree-

24. *See infra* Part I.B.2.

25. *See infra* Part I.B.3.

26. *See infra* Part I.B.4.

27. *See infra* Part I.C.1.

28. *See infra* Part I.C.2.

29. *See also* Beck & Sales, *supra* note 2, at 995.

30. *See also* Beck & Sales, *supra* note 2, at 993, 1039 (noting that "we have no information about whether having an attorney as an advisor has any bearing on . . . satisfaction levels" and "almost no research has been conducted that even mentions pro se litigants, much less that assesses the effects of mediation on these litigants or the progress of their cases."); McEwen et al., *supra* note 2, at 1391.

31. This Article focuses on the effect of having a representative in mediation when the party *attends* mediation, not when the representative attends mediation *instead of* the party. *See, e.g.*, Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 875-76, 894-95 (2008).

ments reached. The studies find few differences consistently associated with representation, suggesting that unrepresented parties might face fewer problems in mediation—and lawyers might create fewer problems—than some claim. The available research is too limited, however, to be able to conclude that lawyers either play an essential role in mediation or are not needed, or that they are particularly helpful or detrimental to the mediation process. Additional findings show that *how* lawyers represent clients during mediation is related to parties' assessments of mediation and settlement. The Article concludes with a discussion of the findings, the limitations of existing studies, and the additional research that is needed to inform policies and practices regarding representation in mediation.

I. EMPIRICAL FINDINGS REGARDING REPRESENTATION IN MEDIATION

This section of the Article presents the findings of the handful of studies that have examined the effect of representational status in mediation, primarily in domestic relations and Equal Employment Opportunity (“EEO”) cases. These findings are supplemented with new analyses of existing datasets involving court-connected domestic relations mediation and general civil mediation, which will be referred to throughout as “the present study” in domestic relations mediation and general civil mediation, respectively.³² Before the findings are presented, the methodology and context of these two studies will be briefly discussed.

The findings of the “present study” of domestic relations mediation are based on data collected as part of a study of mandatory mediation of contested cases involving children in thirteen district and superior courts in Maine.³³ All mediators,³⁴ lawyers, and parties in cases mediated between

32. Most of these analyses are reported for the first time in this article; a few have previously been reported in Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641 (2002) [hereinafter Wissler, *Court-Connected Mediation*] and ROSELLE L. WISSLER, TRAPPING THE DATA: AN ASSESSMENT OF DOMESTIC RELATIONS MEDIATION IN MAINE AND OHIO COURTS (1999) [hereinafter WISSLER, TRAPPING THE DATA] (on file with author).

33. Mediation could resolve all contested issues, including property and financial issues. The mediator reported to the court whether the case was resolved and, if not, which issues remained and whether a hearing or an additional mediation session should be scheduled. If the parties reached an agreement in mediation, a written agreement signed by the parties, or one drafted by their lawyers, formed the basis of an uncontested hearing. If a full agreement was not reached, the parties would have a hearing on the unresolved issues. For more information on the mediation program and study methodology, see WISSLER, TRAPPING THE DATA, *supra* note 32, at 1-16.

34. At that time, the parties paid \$120 to the court to cover up to two mediation sessions; the court in turn paid the mediators, who served as independent contractors, a flat rate of \$50 per session. The mediators had a median of nine years of mediation experience, had mediated a median of 300 domestic relations cases in the prior five years, and had com-

February 1996 and March 1997 were asked to complete a questionnaire at the end of the mediation session.³⁵ The analyses reported here were conducted on the subset of 644 cases for which the questionnaires referred to the final mediation session. Of the 849 parties, 84% had a lawyer; of those, 97% said their lawyer attended their mediation.³⁶

The findings of the “present study” of general civil mediation are based on data collected as part of a study of a pilot mediation program in the general division of five courts of common pleas in Ohio.³⁷ All mediators,³⁸ lawyers, and parties were asked to complete a questionnaire at the end of the mediation session in a total of 688 cases mediated between 1997 and 1998 in three courts in the first phase of the pilot program, and in a total of 393 cases mediated between 1998 and 2000 in two courts in the second phase of the program.³⁹ Almost three-fourths of the cases were referred to mediation by a judge, either at the request of one of the parties or on the judge’s own initiative;⁴⁰ the rest were randomly assigned to mediation. All litigants were represented;⁴¹ accordingly, these data could not be used to examine the effect of having a lawyer, but rather the effect of what the lawyers *did* while representing clients in mediation. The descriptive findings presented here are the average for the five courts; the findings regard-

pleted a median of 106 hours of mediation training. The highest degree held by most of the mediators (78%) was a bachelor’s or master’s degree; 7% had a law degree.

35. The overall response rate was 96% for mediators, 59% for parties, and 71% for lawyers. Whether parties completed a questionnaire was not related to mediator reports of whether the case had settled.

36. Unless otherwise noted, parties whose lawyer did not attend mediation were combined with parties who did not have a lawyer for comparison with parties who had a lawyer in mediation. It is the lawyer’s presence in or absence from the mediation session that is thought to affect the mediation process and outcome on most dimensions. See *infra* Parts I.B.2-4, C.1-2.

37. At that time, mediation was offered at no cost to the parties. There were no financial penalties or disincentives for failure to reach a settlement, and the mediators reported to the court only whether the case settled.

38. All mediators were lawyers and were employed by the courts as half-time or full-time mediators. All mediators had over forty hours of general mediation training, and most also had over forty hours of training specifically in the mediation of civil cases. Some mediators had substantial experience mediating other types of cases; others had less mediation experience but had substantial civil litigation experience.

39. The mediators completed a questionnaire in each case included in the study. Depending on the court, from 155 to 622 parties completed a questionnaire (for a completion rate of 77% to 87% in all but one court, where the rate was 49%). Between 169 to 619 lawyers per court completed a questionnaire (for a completion rate of 88% to 98% in all but one court, where the rate was 50%). For the number of completed questionnaires and the response rate for each court, see Wissler, *Court-Connected Mediation*, *supra* note 32, at 703.

40. These two groups of cases could not be distinguished in the first phase courts; in the second phase courts, about half of these cases were referred at party request.

41. Cases involving unrepresented litigants were excluded from the pilot mediation program. See Wissler, *Court-Connected Mediation*, *supra* note 32, at 652 n.37.

ing the effect of what the lawyers did in mediation are the result of meta-analyses.⁴²

A. How Many Parties Are Unrepresented in Mediation?

Few mediation studies reported whether parties were represented or unrepresented. In those that did, the proportion of unrepresented parties varied by the type of case and the jurisdiction, in part reflecting differences in policies regarding case eligibility for mediation and practices regarding lawyers' attendance at mediation. Because of these policies, the proportion of unrepresented parties in mediation was likely to be smaller than in all filed cases.

Across several studies of domestic relations mediation, the proportion of cases in which both parties were unrepresented ranged from 3% to 33%, and the proportion of cases in which only one party was unrepresented ranged from 17% to 26%.⁴³ Cases in court-connected mediation are likely to involve fewer unrepresented parties than all filed divorce cases because courts generally mandate mediation only in contested cases, and parties in contested cases are less likely to be unrepresented.⁴⁴ Whether lawyers accompany their clients to mediation depends on the policies and practices in specific jurisdictions. Some courts prohibit the exclusion of lawyers from mediation; others permit mediators to exclude lawyers from mediation or to limit their participation during mediation.⁴⁵ Even in jurisdictions where lawyers may attend mediation, they often do not.⁴⁶ Accordingly, in domes-

42. Meta-analysis takes into consideration the strength, direction, and degree of statistical significance of the effect found in each court and essentially averages the effects across the courts, providing measures that indicate the overall strength and direction of the effect (*r*) and its statistical significance (*p*). The meta-analytic methods used are those in ROBERT ROSENTHAL, *META-ANALYTIC PROCEDURES FOR SOCIAL RESEARCH* 88-91 (4th prtg. 1989).

43. See, e.g., Beck & Sales, *supra* note 2, at 994; Joan B. Kelly, *Family Mediation Research: Is There Empirical Support for the Field?*, 22 CONFLICT RESOL. Q. 3, 6, 9-10 (2004); McEwen et al., *supra* note 2, at 1359. In the present study, both parties were unrepresented in 10% of cases, and one party was unrepresented in 18%. See also CTR. FOR FAMILIES, CHILDREN & THE COURTS, *DEMOGRAPHIC TRENDS OF CLIENTS IN COURT-BASED CHILD CUSTODY MEDIATION* 3 (July 2005), available at <http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/SUSRSDemoTrends.pdf> (finding that at least one parent was unrepresented in 69% of mediated cases in California in 2003).

44. McEwen et al., *supra* note 2, at 1358, 1359 n.244, 1391.

45. SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY, PRACTICE* § 6:7 (2d ed. 2007-08 cumulative supplement issued in Dec. 2007); McEwen et al., *supra* note 2, at 1331. Excluding lawyers from mediation, particularly when mediation is mandatory, is contrary to recommendations. See, e.g., UNIFORM MEDIATION ACT §10 (2001). See also Reuben, *supra* note 3, at 1095-96 (arguing that statutes excluding counsel from court-connected mediation would be unconstitutional); NAT'L STANDARDS, *supra* note 17, §§ 10.2, 11.3 & cmts.

46. See, e.g., McEwen et al., *supra* note 2, at 1331, 1351-52; Suzanne Reynolds et al., *Back to the Future: An Empirical Study of Child Custody Outcomes*, 85 N.C. L. REV. 1629,

tic relations mediation, there is not a simple distinction between “represented” and “unrepresented” parties, but an additional intermediate category of parties who have counsel but who do not have representation within the mediation session itself.⁴⁷ Some divorce mediation statutes or court rules assign mediators the duty to warn parties of the risks of proceeding without counsel or to advise parties to seek independent legal advice or have a lawyer review settlement proposals before signing an agreement.⁴⁸

Studies of Equal Employment Opportunity (“EEO”) mediation showed different patterns of the extent and type of representation in different settings. In a pilot mediation program involving several Equal Employment Opportunity Commission (“EEOC”) offices, one party was unrepresented in 33% of cases, and both parties were unrepresented in 45% of cases.⁴⁹ Among represented parties, most charging parties and all responding parties were represented by a lawyer; the remaining charging parties had union representation.⁵⁰ In a transformative mediation program involving informal EEO complaints within the U.S. Postal Service, charging parties were unrepresented in one-third of cases, and responding parties were unrepresented in two-thirds of cases.⁵¹ Among represented parties, only 5% of charging parties and 3% of responding parties were represented by a lawyer; instead, they were primarily represented by a union representative or a fellow employee.⁵² Thus, in EEO mediation, the distinction is not only

1634 (2007). For instance, although 89% of parties in a study of Ohio domestic relations mediation had counsel, only 8% of those parties had a lawyer present during mediation. WISSLER, TRAPPING THE DATA, *supra* note 32, at 57. Lawyers’ presence may depend, in part, on whether financial and property issues are permitted to be addressed in mediation. MATHER ET AL., *supra* note 3, at 75. But even within a state, lawyers’ attendance at mediation varied widely, from fewer than 10% of cases to 98% of cases. McEwen et al., *supra* note 2, at 1331 n.72.

47. See also Hannaford-Agor & Mott, *supra* note 4, at 176.

48. McEwen et al., *supra* note 2, at 1332-33, 1397-98, 1401-02, 1405-06, 1409.

49. CRAIG A. MCEWEN, AN EVALUATION OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION’S PILOT MEDIATION PROGRAM 43 (1994) (on file with author). When only one party was represented, it was as likely to be the charging party as the responding party. *Id.* at 50.

50. E-mail from Craig McEwen, Oct. 5, 2008 (on file with author).

51. Lisa B. Bingham et al., *Exploring the Role of Representation in Employment Mediation at the USPS*, 17 OHIO ST. J. ON DISP. RESOL. 341, 356, 364 (2002); Tina Nabatchi & Lisa B. Bingham, *Transformative Mediation in the USPS REDRESS Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L.J. 399, 401-03 (2001).

52. Sixty-three percent of represented charging parties were represented by the union, and 20% were represented by a fellow employee; 45% of represented responding parties were represented by a fellow employee. Bingham et al., *supra* note 51, at 364. The rate of legal representation in this setting might be lower because these were informal EEO complaints, in contrast to the formal complaints mediated in the EEOC offices in the McEwen

between unrepresented and represented parties, but also between lawyer and non-lawyer representatives.⁵³

Studies of court-connected general civil mediation seldom report the proportion of unrepresented litigants. Most programs exclude cases involving unrepresented parties from eligibility for mandatory referral to mediation⁵⁴ and require lawyers to accompany their clients to mediation.⁵⁵ Given these policies, few unrepresented parties are likely to appear in general civil mediation,⁵⁶ fewer than in all filed civil cases, and too few to allow us to examine the effects of representation.

The reverse situation exists in small claims mediation: most cases involve two unrepresented parties, even though they have the right to retain counsel in many jurisdictions.⁵⁷ The proportion of unrepresented parties in small claims mediation is likely to be smaller than that in all filed small claims cases because mediation typically is available only in cases where both parties appear on the date of trial,⁵⁸ and unrepresented parties are less likely than represented parties to appear in court to prosecute or defend the case.⁵⁹ There tend to be too few represented parties to be able to examine the effects of representation in small claims mediation.

study. Cf. MCEWEN *supra* note 49. For other ways in which the USPS program differed from other EEO mediation programs, see *infra* note 91.

53. This distinction also applies in special education mediation and perhaps in other types of mediation as well. See Peter J. Kuriloff & Steven S. Goldberg, *Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings*, 2 HARV. NEGOT. L. REV. 35, 55-56 (1997); Welsh, *supra* note 15.

54. ROBERT J. NIEMIC, FED. JUDICIAL CTR., *MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS* 5-6 (1997); Wissler, *supra* note 11, at 71. Cases involving unrepresented parties might enter court-connected mediation at the agreement of both parties, but their numbers are likely to be small. A few mediation programs arrange pro bono limited purpose representation so that otherwise unrepresented parties can participate in mediation. See, e.g., Joseph A. Torregrossa, *Appellate Mediation in the Third Circuit – Program Operations: Nuts, Bolts and Practice Tips*, 47 VILL. L. REV. 1059, 1080-81 (2002); see also NAT'L STANDARDS, *supra* note 17, §§ 1.4, 4.2(c) & cmts. (recommending that courts not exclude all unrepresented litigants from mediation, but instead make a case-by-case determination of the parties' ability to negotiate effectively).

55. NIEMIC ET AL., *supra* note 14, at 56; Wissler, *supra* note 11, at 63, 72.

56. See e.g., Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 277 (1999) (citing survey results that 75% of responding Florida courts reported that lawyers were present in all civil mediation sessions, and the remaining courts reported that lawyers were present in most sessions); Wissler, *Court-Connected Mediation*, *supra* note 32, at 657 (lawyers were present at mediation in virtually every case).

57. Wissler, *supra* note 11, at 56.

58. *Id.* at 56-57.

59. See Suzanne E. Elwell & Christopher D. Carlson, *The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV. 433, 443, 511 (1990).

B. What Effect Does Representation Have on the Mediation Process?

1. Does Representation Enhance Party Preparation for Mediation?

For parties' participation in mediation to be informed and for the mediation process and outcome to be fair, parties need to understand what is likely to happen during the mediation process, what the role of the mediator is, and that they can terminate mediation at any time.⁶⁰ Parties who are more prepared for mediation are generally thought to have a better experience and a more productive session, and represented parties are presumed to be better prepared for mediation than unrepresented parties.⁶¹

Little is known about unrepresented parties' understanding of the mediation process, the role of the mediator, or how mediation fits into the larger litigation context. Charging parties in EEO mediation, most of whom were unrepresented, often had unrealistic expectations about the process and possible outcomes.⁶² Parents interviewed before they participated in special education mediation hoped that the mediator would, among other things, do the talking for them and persuade school officials to consider their views.⁶³ Few of the parents were prepared to suggest or explore solu-

60. See Nolan-Haley, *supra* note 17, at 778-80; see also ABA MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION, Standard III.A (2001) [hereinafter ABA MODEL DIVORCE MEDIATION STANDARDS], available at <http://www.afcnet.org/pdfs/modelstandards.pdf>; NAT'L STANDARDS, *supra* note 17, §§ 1.4, 3.1, 3.2, 11.2 & cmts.; ALFINI ET AL., *supra* note 22, at 430; Welsh, *supra* note 15, at 657-58.

61. See, e.g., ABA SECTION OF DISPUTE RESOLUTION TASK FORCE ON IMPROVING MEDIATION QUALITY, FINAL REPORT 10-11 (2008) [hereinafter MEDIATION QUALITY], available at <http://www.abanet.org/dispute/documents/FinalTaskForceMediation.pdf> (reporting that experienced commercial mediation users consistently stressed the importance of lawyer and client preparation for mediation); HAROLD I. ABRAMSON, MEDIATION REPRESENTATION: ADVOCATING IN A PROBLEM-SOLVING PROCESS 159-60 (2004); ALFINI ET AL., *supra* note 22, at 430; COLE ET AL., *supra* note 45, at §§ 4:10-11; JULIE MACFARLANE, THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW 146 (2008); Tom Arnold, 20 *Common Errors in Mediation Advocacy*, 13 ALTERNATIVES TO THE HIGH COST OF LITIGATION 69, 70 (1995); Beck & Sales, *supra* note 2, at 1000, 1039; Donald T. Saposnek, *Commentary: The Future of the History of Family Mediation Research*, 22 CONFLICT RESOL. Q. 37, 40-41 (2004); Mark S. Umbreit et al., *Victim-Offender Mediation: Three Decades of Practice and Research*, 22 CONFLICT RESOL. Q. 279, 284-85 (2004); Welsh, *supra* note 15, at 657-58. See generally Frank V. Ariano, *A Lawyer's Guide to Preparing Clients for Family Law Mediation*, 90 ILL. B.J. 600 (2002); Shelby R. Grubbs, *Preparing for Mediation: An Advocate's Checklist*, 32 TENN. B.J. 14 (Mar./Apr. 1996).

62. MCEWEN, *supra* note 49, at 61-62. One of the study's recommendations was that the EEOC develop "informational materials about the EEOC process and about mediation that would permit charging parties to make informed decisions about how to proceed with their charges and to have more realistic expectations when they do so." *Id.* at 81.

63. Welsh, *supra* note 15, at 621-22. These findings are based on pre-mediation interviews with parents in fourteen cases mediated during a two-month period in 2000. *Id.* at 607-11. None of the parents were represented in mediation by a lawyer; two were represented by a lay advocate. *Id.*

tions other than those they had already proposed; most seemed to hope that school officials would simply accept their demands upon gaining a better understanding of their child during mediation.⁶⁴ In addition, what parties do to learn about and prepare for mediation has seldom been explored. In domestic relations mediation, 38% of unrepresented parties read a court-provided brochure about mediation, 24% spoke to someone from the court about mediation, and 20% gathered information about mediation on their own.⁶⁵

Having a lawyer is no guarantee that parties will receive information about and preparation for mediation. Only 44% of parties in one domestic relations study met with their lawyer to talk about mediation before the first session.⁶⁶ In another study, represented parties often had “profound misconceptions” about the goals of divorce mediation.⁶⁷ Almost half of represented parties interviewed in a study of general civil mediation felt ill-prepared for mediation and uncertain about what to expect.⁶⁸ Many parties said preparation by their lawyer consisted of a brief discussion just before the mediation session; others received no preparation at all.⁶⁹ By contrast, most parties in the present study of general civil mediation received preparation for mediation from their lawyers: 57% received considerable preparation and 37% received some preparation. Only 6% received little or no preparation.

The *amount* of preparation parties received from their lawyers⁷⁰ was uniformly and favorably related to parties’ and lawyers’ assessments of medi-

64. *See id.* at 627-28.

65. WISSLER, TRAPPING THE DATA, *supra* note 32 (based on new analyses of only unrepresented parties in the Ohio dataset). Parties were asked to check every action they took; some engaged in several of these actions. Interestingly, represented parties were equally likely to engage in these actions.

66. *Id.* Whether parties met with their lawyer prior to mediation was not related to their assessments of mediation or to settlement. *Id.* at 83, 92. In these courts, lawyers generally did not attend mediation. *Id.* at 57.

67. Jessica Pearson & Nancy Thoennes, *Divorce Mediation: An Overview of Research Results*, 19 COLUM. J.L. & SOC. PROBS. 451, 466 (1985).

68. Julie Macfarlane & Michaela Keet, *Civil Justice Reform and Mandatory Civil Mediation in Saskatchewan: Lessons from a Maturing Program*, 42 ALBERTA L. REV. 677, 692 (2005). These findings are based on focus groups with thirty-one parties and interviews with eight institutional parties. *Id.* at 686.

69. MACFARLANE, *supra* note 61, at 204. Lawyers themselves sometimes are not prepared for mediation. *See* Craig A. McEwen et al., *Lawyers, Mediation, and the Management of Divorce Practice*, 28 LAW & SOC’Y REV. 149, 159 (1994) (finding that 39% of divorce lawyers reported other lawyers were only “sometimes” or “rarely” well prepared for mediation).

70. Parties were asked to rate “Prior to the mediation, did your lawyer help you prepare for the mediation process?” on a five-point scale, from “not at all” to “a great deal.” Law-

ation⁷¹ in the present study of general civil mediation (see Table 1).⁷² Parties who had more preparation for mediation, compared to parties with less preparation, thought that the mediation process was more fair; that they had more chance to tell their views and more input into the outcome; and that the mediator was more impartial, understood their views better, and treated them with more respect.⁷³ Notably, parties who had more preparation felt *less* pressured to settle than did parties who had less preparation. In addition, parties who received more preparation for mediation were more likely to settle and were more likely to think the settlement was fair.⁷⁴

yers were asked to rate “Did you prepare your client for the mediation session?” on the same scale.

71. Parties and lawyers rated the mediator and the mediation process on a number of dimensions, each on a five-point scale from “not at all” to “a great deal.”

72. To determine whether an observed relationship between two measures is a “true” relationship (or whether an observed difference between two or more groups is a “true” difference) or merely reflects chance variation, tests of statistical significance must be conducted. The conventional level of probability for determining the statistical significance of findings is the .05 level (*i.e.*, $p < .05$). The correlation coefficient (r) indicates the strength and direction of the relationship, and ranges from +1.00 to -1.00, with .00 indicating no relationship between the measures. Cramer’s V provides a measure of the strength of the effect for chi-square (χ^2) analyses. See RICHARD P. RUNYON & AUDREY HABER, *FUNDAMENTALS OF BEHAVIORAL STATISTICS* 140-142, 230 (5th ed. 1984).

73. Perhaps these relationships were relatively small because of variation in the content of the preparation received. For the components of mediation preparation that parties and lawyers think are helpful, see *MEDIATION QUALITY*, *supra* note 61, at 10-11; Macfarlane & Keet, *supra* note 68, at 693; *see also, e.g.*, ALFINI ET AL., *supra* note 22, at 430; JOHN W. COOLEY, *MEDIATION ADVOCACY* 49-50, 92-93 (2d ed. 2002); Arnold, *supra* note 61, at 70. In addition, parties in commercial mediation who felt their lawyers had better prepared them for mediation were more satisfied with their lawyers, and some reported making subsequent hiring decisions based on how much their lawyers had prepared for mediation. *MEDIATION QUALITY*, *supra* note 61, at 10-11.

74. Settlement, $r = .115$, $p < .01$. *See also* Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241, 261 n.79 (2002) (reporting that several empirical studies found lack of preparation to be an important reason for failing to settle in mediation).

Table 1. Relationships Between the Amount of Party Preparation and Parties' and Lawyers' Assessments of General Civil Mediation

Parties' Assessments			
Fair process	.159 ^{***}	Treated with respect	.097 ^{***}
Mediator was impartial	.115 ^{***}	Not pressured by mediator	.067 ^{**}
Chance to tell views	.164 ^{***}	Not pressured by other side	.064 [*]
Input into outcome	.155 ^{***}	Understood other's views	.074 ^{**}
Mediator understood views	.150 ^{***}	Understood own case	.144 ^{***}
Recommend mediation	.105 ^{***}	Satisfaction with process	.105 ^{***}
Fair settlement	.087 [*]		
Lawyers' Assessments			
Fair process	.134 ^{***}	Mediator effective	.105 ^{***}
Mediator impartial	.101 ^{***}	Parties' relationship	.084 ^{***}
Party involvement	.155 ^{***}	Timely issue definition	.124 ^{***}
Recommend mediation	.181 ^{***}	Evaluate other's case	.118 ^{***}
Fair settlement	.069 ⁺	Evaluate own case	.144 ^{***}

Notes: Positive Pearson correlation coefficients indicate that more preparation is associated with more favorable assessments.

⁺ $p < .10$; ^{*} $p < .05$; ^{**} $p < .01$; ^{***} $p < .001$

Lawyers who engaged in more client preparation for mediation also had consistently more favorable assessments of mediation than lawyers who did less client preparation in the present general civil mediation study (see Table 1). For instance, lawyers who did more client preparation thought that mediation was more fair, allowed more party involvement in resolving the case, and was more helpful in defining the issues and evaluating both their client's and the other side's case.

Getting other forms of information or assistance before mediation, however, seemed to be associated with less favorable views of mediation and a lower rate of settlement. Cases in domestic relations mediation were less likely to settle if one or both parties had gathered information about mediation on their own (46%) or had talked with someone from the court about mediation (41%) than if neither party had done so (61% and 68%, respec-

tively).⁷⁵ Parties who took these actions also tended to have less favorable assessments of mediation.⁷⁶ Similarly, in EEO cases, charging parties who had sought assistance prior to mediation were less likely to settle in mediation than were parties who had not sought assistance.⁷⁷ Getting pre-mediation information or assistance might be expected to be helpful or to have no effect;⁷⁸ it is not clear why it seems to have had negative effects. Perhaps these findings reflect the nature of the information the parties received, but they may say more about the parties or the cases in which they are motivated to seek additional information.⁷⁹

In sum, parties often had inaccurate and unrealistic expectations about mediation. Although unrepresented parties sometimes sought out information about mediation, this was not necessarily helpful. Represented parties were not always better informed about mediation, as their lawyers often did not prepare them for the process. The more preparation lawyers gave their clients, however, the more favorable the parties' assessments of mediation and the more likely the case was to settle.

2. *Does Representation Enhance the Fairness of the Mediation Process and Reduce Pressures to Settle?*

Process fairness, mediator impartiality, lack of coercion, and party self-determination are among the most fundamental principles of mediation.⁸⁰

75. WISSLER, TRAPPING THE DATA, *supra* note 32, at 83. These findings include both represented and unrepresented parties. Reading a court-provided brochure about mediation was not related to settlement. *Id.*

76. *Id.* at 93. Reading a court-provided brochure was not related to parties' assessments. *Id.*

77. Thirty-one percent and over 52%, respectively. MCEWEN, *supra* note 49, at 43, n.12.

78. Divorce education classes, offered in some jurisdictions prior to mediation though not designed specifically as preparation for mediation, have been found to help improve parties' communication skills and to reduce conflict, which in turn could make their subsequent discussions in mediation more productive. Saposnek, *supra* note 61. Prior to victim-offender mediation, mediators or program staff typically meet separately with each party, leading most parties to feel adequately prepared for mediation and enhancing the success of mediation. Umbreit et al., *supra* note 61, at 285.

79. MCEWEN, *supra* note 49, at 43 n.12.

80. See, e.g., MODEL STANDARDS OF CONDUCT FOR MEDIATORS, §§ I.A, II, VI.A (Am. Arb. Ass'n et al. 2005) [hereinafter AAA MODEL STANDARDS], available at http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf; ABA MODEL DIVORCE MEDIATION STANDARDS, *supra* note 60, §§ I, IV; MODEL RULE FOR THE LAWYER AS THIRD-PARTY NEUTRAL, R. 4.5.3, 4.5.6 & cmts. (CPR-Georgetown Comm'n on Ethics and Standards in ADR) [hereinafter MODEL RULE FOR NEUTRALS]; NAT'L STANDARDS, *supra* note 17, §§ 8.1.f, 11.1 & cmts.; Nolan-Haley, *supra* note 17, at 787; Leonard Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329, 349, 354 (1984); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-*

Procedural justice research has shown that these dimensions are interrelated: parties' sense that they have control over the process and outcome and that they have received even-handed, considered, and respectful treatment by the third party contributes to their views that the process is fair.⁸¹ Some commentators argue that lawyers increase fairness in mediation by protecting their clients against mediator pressure as well as the opposing side's unfair bargaining advantages.⁸² Others suggest that lawyers might not be needed because mediators can, and in some jurisdictions are required to, ensure the fairness of the process by addressing power imbalances between the parties and by remaining impartial and not exerting pressure on the parties; some, however, question whether mediators can fulfill these duties.⁸³

Several studies found that representation had no effect on parties' assessments of the fairness of the mediation process. Two EEO mediation studies found no relationship between representation in mediation and parties' views of fairness.⁸⁴ In the present domestic relations mediation study,

Connected Mediation: The Inevitable Price of Institutionalization? 6 HARV. NEGOT. L. REV. 1, 15, 78-84 (2001).

81. See *infra* Part I.B.3 (discussing "voice" and participation). See, e.g., E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 104, 214 (1988); Tom R. Tyler & E. Allan Lind, *Procedural Justice*, in *HANDBOOK OF JUSTICE RESEARCH IN LAW* 65, 75-76 (Joseph Sanders & V. Lee Hamilton eds., 2000); Nourit Zimmerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L.J. 473, 482-84 (2010); Wissler, *supra* note 10, at 346.

82. See, e.g., MACFARLANE, *supra* note 61, at 216-18; E. Patrick McDermott & Danny Ervin, *The Influence of Procedural and Distributive Variables on Settlement Rates in Employment Discrimination Mediation*, 2005 J. DISP. RESOL. 45, 59 (2005); McEwen et al., *supra* note 2, at 1327, 1348, 1360-61, 1376; Reuben, *supra* note 3, at 1098; Kenneth K. Stuart & Cynthia A. Savage, *The Multi-Door Courthouse: How It's Working*, 26 COLO. LAW. 13, 15 (1997).

83. See, e.g., AAA MODEL STANDARDS, *supra* note 80, § VI; ABA MODEL DIVORCE MEDIATION STANDARDS, *supra* note 60, §§ XI, 25.4 ("[A] family mediator shall suspend or terminate the mediation process when the mediator reasonably believes that a participant is unable to effectively participate."); MODEL RULE FOR NEUTRALS, *supra* note 80, R. 4.5.3, 4.5.6 & cmts; McEwen et al., *supra* note 2, at 1325-26, 1332-34; 1397-98, 1405-06.

84. MCEWEN, *supra* note 49, at 57, 59 (finding that neither charging parties' nor responding parties' views of fairness were related to whether neither, one, or both parties were represented; 92% of all parties thought the mediation process was fair). Most of the represented parties were represented by lawyers. See *supra* note 50 and accompanying text. This study's findings are based on information from charge records completed by mediators and questionnaires completed by 204 charging parties and 216 responding parties following the mediation of 267 claims in 1993-1994. These claims were mediated as part of a voluntary pilot program in four EEOC field offices, in which mediation was arranged by EEOC staff and conducted by private mediators who did not report the mediation discussions to the EEOC. MCEWEN, *supra* note 49, at 4-6, 18, n.5. If the parties did not reach complete agreement in mediation, the charging party was free to continue the EEOC process; if an agreement was reached, the EEOC would review it "to insure that it did not compromise the statutory rights of the charging party." *Id.* at 6. Arup Varma & Lamont E. Stallworth, *Par-*

whether parties had a lawyer in mediation was not related to whether they felt the process was fair.⁸⁵ Nor was the combined representational status of both parties (*i.e.*, whether neither party, mother only, father only, or both were represented) related to parties' views of fairness.⁸⁶ Perhaps the effect of representation was muted in this study because mediators evened out bargaining imbalances: mediators were more likely to say they "tried to even out bargaining imbalances" when only one party had a lawyer present (100%) than when neither (93%) or both (86%) parties had lawyers present.⁸⁷

Some might argue that these studies found no effect of representation because unrepresented parties were unaware of what constitutes unfair procedures, and thus rated "objectively unfair" processes as fair.⁸⁸ In the present domestic relations and general civil mediation studies, however, parties rated the mediation process as *less* fair than their lawyers did,⁸⁹ suggesting that parties did not have overly favorable assessments. Regardless of their "objective accuracy," parties' assessments of process fairness are considered important measures of the quality of dispute resolution procedures and are related to parties' compliance with agreements as well as their views of the legal system and its legitimacy.⁹⁰

ticipants' Satisfaction with EEO Mediation and the Issue of Legal Representation: An Empirical Study, 6 EMP. RTS. & EMP. POL'Y J. 387, 403, tbl.3, 410 (2002) (finding no differences in fairness ratings between unrepresented and lawyer-represented parties). This study's findings are based on questionnaires completed by twenty-five parties whose EEO disputes had gone through voluntary mediation conducted by a mediation service provider for the Kansas Human Rights Commission. *Id.* at 395-98. This small sample size can make it difficult to find statistically significant differences. See RUNYON & HABER, *supra* note 72, at 345-46. However, the lack of differences on this particular measure is not due to the small sample; the mean ratings of the two groups are identical (3.55 on a five-point scale).

85. Fifty-seven percent of parties thought the mediation process was very fair and 35% thought it was somewhat fair; only 7% thought it was somewhat or very unfair.

86. Where possible, the effect of representation was examined both at the level of the individual party and at the case level (*i.e.*, the combined representational status of both parties) in the present domestic relations study. Analyses at the individual level tell us only how parties' views are affected by whether *they* have representation, without regard to whether the other party is represented. Most studies have examined the effect of representation only at the individual party level.

87. $\chi^2(2) = 14.81, p < .01, V = .10$. Given that virtually all parties thought the mediators were neutral, whatever the mediators did to try to even out bargaining imbalances apparently did not lead parties to view them as favoring one side or the other.

88. See, e.g., Tom R. Tyler, *The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities*, 66 DENV. U. L. REV. 419, 432-33 (1989).

89. Domestic relations: female parties, $t(277) = 6.92, p < .001$; male parties, $t(248) = 8.29, p < .001$. For civil mediation, see Wissler, *supra* note 32, at 663.

90. See LIND & TYLER, *supra* note 81, at 64-83, 208-11; Neil Vidmar, *Procedural Justice and Alternative Dispute Resolution*, in PROCEDURAL JUSTICE 121, 132 (Klaus F. Röhl & Stefan Machura eds., 1997); Robert A. Baruch Bush, *Defining Quality in Dispute Resolu-*

In contrast to the preceding studies, two other studies found that legal representation was related to parties' assessments of fairness, and that different representatives had different effects on fairness. The first study, which involved the mediation of informal EEO complaints,⁹¹ found that charging parties were more likely to be "very satisfied with the fairness of the mediation process" when they were unrepresented than when they were represented by a lawyer, but that the opposite was true for responding parties.⁹² Charging parties were less likely to be "very satisfied" with mediation's fairness when they were represented by a lawyer than by other types of representatives, but the reverse was true for represented responding parties.⁹³ Thus, lawyers had a different effect on the fairness assessments of charging parties than responding parties, and lawyers had a different effect than other types of representatives.

These findings suggest that it was not representation per se, nor legal representation, that affected parties' views of process fairness. Rather, perhaps something about the way in which the different types of representatives conducted their representation led parties to see the mediation process as more or less fair. Although the researchers did not examine whether differences existed in how the different types of representatives actually

tion: *Taxonomies and Anti-Taxonomies of Quality Arguments*, 66 DENV. U. L. REV. 335, 348-51 (1989); Riskin, *supra* note 80, at 356-57; Tyler & Lind, *supra* note 81, at 71, 74.

91. See generally Bingham et al., *supra* note 51. This study's findings are based on 7,651 mediator case reports and exit surveys completed by 7,989 complainants and 6,794 respondents following the voluntary mediation of EEO complaints within the USPS over several years. *Id.* at 355-65. This program differed from other EEO mediation programs in a number of ways that could have resulted in different effects of representation: the setting (operated by the employer), the mix of cases ("informal" EEO complaints), the type of mediation (transformative), the mandatory participation of responding parties, the speed with which cases entered mediation (within several weeks), the types of representatives (primarily non-lawyers), the fact that the responding parties who attended mediation were the subject of the complaint, and the fact that lawyers for responding parties were provided at no cost. See *id.*; Lisa B. Bingham, *Mediating Employment Disputes: Perceptions of Redress at the United States Postal Service*, 17 REV. PUB. PERSONNEL ADMIN. 20, 23 (1997); Lisa B. Bingham & Mikaela Cristina Novac, *Mediation's Impact on Formal Discrimination Complaint Filing: Before and After the Redress Program at the U.S. Postal Service*, 21 REV. PUB. PERSONNEL ADMIN. 308, 310 (2001); Nabatchi & Bingham, *supra* note 51, at 403. In addition, the study's very large sample size would make it easier to find statistically significant differences. See RUNYON & HABER, *supra* note 72, at 345-46.

92. Bingham et al., *supra* note 51, at 367. Among charging parties, 67% of those who were unrepresented and 46% who were represented by a lawyer were "very satisfied" with the fairness of the mediation process. *Id.* at 368. Among responding parties, 72% of those who were unrepresented and 81% represented by a lawyer were "very satisfied." *Id.* at 370.

93. Among charging parties, 63% of those represented by the union and 62% represented by a co-worker were "very satisfied" with the fairness of the mediation process. *Id.* at 368. Among responding parties, 68% of those represented by a co-worker and 64% of those with an association representative were "very satisfied." *Id.* at 370. See *supra* note 92 for the ratings of parties who were represented by lawyers.

handled cases in mediation,⁹⁴ they did note several characteristics on which the representatives differed that might have affected how they represented clients in mediation. For instance, lawyers for charging parties had less experience with transformative mediation, less knowledge of the workplace setting and policies, and preferences that were less closely aligned with those of their clients than did lawyers for responding parties and other representatives.⁹⁵ As a result, lawyers for charging parties might have represented their clients in a different way during mediation, which in turn led their clients to see the process as less fair.⁹⁶

The second study, which involved special education mediation, found that unrepresented parents and parents with non-lawyer advocates thought the mediation process was less fair than did parents who had lawyers.⁹⁷ These findings might differ from those of other studies because of differences in the mediation context or the study methodology.⁹⁸ For example,

94. See, e.g., Macfarlane, *supra* note 74, at 253-60 (identifying five “ideal types” of mediation practice that reflected what lawyers sought to achieve in mediation, what approach they used during the session, and how they viewed their clients’ role in mediation); see also Karl Monsma & Richard Lempert, *The Value of Counsel: 20 Years of Representation Before a Public Housing Eviction Board*, 26 LAW & SOC’Y REV. 627, 658-59 (1992) (finding that lawyers used several different styles when representing clients in public housing eviction hearings); Andrea Kupfer Schneider & Nancy Mills, *What Family Lawyers Are Really Doing When They Negotiate*, 44 FAM. CT. REV. 612, 612-16 (2006) (finding that lawyers’ negotiation behavior could be categorized into several different styles).

95. See Bingham et al., *supra* note 51, at 353-55, 366, 372-75.

96. *Id.* at 374; see also KRITZER, LEGAL ADVOCACY, *supra* note 3, at 108, 170, 195 (finding that familiarity and experience with the specific procedure and setting, plus knowledge of past practices and ongoing relationships, were important factors in representatives’ effectiveness in hearings in various settings); *infra* notes 128-31 and accompanying text (discussing how possible differences in style of representation might have affected parties’ satisfaction with their level of participation).

97. Kuriloff & Goldberg, *supra* note 53, at 55. Parents were given the option to mediate when they requested a due process hearing; if they did not settle in mediation, they proceeded to a formal hearing. *Id.* at 45. Questionnaires were completed by parents who had gone to mediation in 1987-1988. *Id.* at n.58. The analyses examining the effect of representation on parents’ views included only cases that settled and were based on twenty-three to thirty-eight responses, depending on the measure. See *id.* at 55-56. The researchers combined unrepresented parents and parents represented by non-lawyer advocates into a single group for most analyses. See *id.*

98. For example, this study used a “process fairness” scale comprised of nineteen items, some of which might have tapped different aspects of parties’ views and, thus, produced different responses than the single measures used in other studies. For example, some of the items in this scale were whether the parties gave up more than they wanted to, whether they felt pressured to settle, whether they could express their views, and whether the process was impartial. *Id.* at 47. The fact that this study examined the views of only parties who settled in mediation does not seem to explain why it found an effect of representation. In the present domestic relations mediation study, when the responses of only parties who settled were analyzed, there still was no effect of representation on parties’ views of process fairness or mediator neutrality.

the impact of having a lawyer might have been greater in this study because the opposing party always was represented by a lawyer,⁹⁹ which was less often the case in the other contexts. Importantly, parties who thought their representative (lawyer or lay advocate) was more “effective” thought the mediation process was more fair.¹⁰⁰ This latter finding lends additional support to the notion that characteristics of the representatives or how they conduct their representation affects parties’ assessments of mediation.¹⁰¹

With regard to other party perceptions, namely settlement pressure and mediator neutrality, the present domestic relations mediation study generally found that representation had no effect. Whether parties did or did not have a lawyer in mediation was not related to whether they felt pressured to settle; nor was the combined representational status of both parties related to their feeling pressured to settle. Overall, 6% of parties felt pressured to settle by the mediator, 13% felt pressured by the other side, and 6% felt pressured by their own lawyer.¹⁰² In addition, whether parties had a lawyer in mediation did not affect whether they thought the mediator was neutral.¹⁰³ When looking at the parties’ combined representational status, female parties’ views of mediator neutrality did not vary, but male parties were more likely to think the mediator favored them when they alone were represented.¹⁰⁴

Representation appeared to affect another aspect of domestic relations mediation that could have implications for parties’ perceptions of settlement pressure and process fairness, even though it did not in the present study. Mediators were less likely to say they used domestic violence protocols when neither party had a lawyer present in mediation (74%) than in

99. *Id.* at 56.

100. *Id.* at 57-58. This was true both for parents ($r = .40$) and for school officials ($r = .33$). The “effectiveness of advocate” scale was comprised of eleven items, including whether parties thought their representative helped them get their story out, helped balance power, was knowledgeable about the relevant law, and was a source of support. *Id.* at 47.

101. See also E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants’ Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC’Y REV. 953, 969, 972 (1990) (finding that, in a variety of dispute resolution processes other than mediation, parties’ evaluations of their lawyers’ knowledge of the facts of the case and their trust that their lawyers would make decisions in their best interest were strongly related to procedural fairness judgments).

102. See also MACFARLANE, *supra* note 61, at 219 (reporting that among cases in which parties sought to overturn mediated settlements on the basis of duress, many more were the result of pressure by their lawyer rather than pressure by the mediator); Howard Erlanger et al., *Participation and Flexibility in Informal Processes: Cautions From the Divorce Context*, 21 LAW & SOC’Y REV. 585, 591, 593 (1987) (reporting that parties in bilateral negotiations felt settlement pressure from their lawyers).

103. Ninety-seven percent of parties thought the mediator was neutral.

104. $F(3,360) = 3.91, p < .01$.

cases where one (81%) or both (88%) parties had lawyers in mediation.¹⁰⁵ Perhaps the mere presence of a lawyer prompted the mediators to use the domestic violence protocols, or perhaps the lawyers brought up the issue of abuse, leading the mediators to inquire further about it. The parties' representational status did not affect whether the mediators conducted mediation in the usual way or used alternate procedures, such as separating the parties, upon learning of abuse. The presence of domestic violence was not related to parties' views of mediation fairness, mediator impartiality, or settlement pressure.¹⁰⁶ Nonetheless, these findings suggest that lack of representation may make it less likely that mediators will learn of abuse.

In sum, there were no differences between represented and unrepresented parties in whether they felt pressured to settle or thought the mediator was neutral. Three studies found no differences between represented and unrepresented parties in their assessments of the fairness of the mediation process. Two studies found differences, but there was no consistent pattern as to whether unrepresented parties thought the process was more or less fair than parties represented by a lawyer. Nor were lawyers consistently associated with greater fairness than other types of representatives. The way in which lawyers represented clients in mediation appeared to play a role in parties' views of process fairness.

3. *Does Representation Enhance or Limit Party Participation and Expression of Views?*

Direct party participation is a key distinguishing feature of mediation and is thought to enhance parties' understanding of the other side's views and facilitate agreements that meet the parties' interests.¹⁰⁷ Some commentators are concerned that lawyers' presence in mediation will limit parties' direct communication and will inhibit or transform their discussion of feelings, issues, and solutions; others argue that lawyers' presence is critical to

105. $\chi^2(2) = 9.69, p < .01, V = .133$. This difference was not because abused parties were more likely to be represented; there was no relationship between representation and parties' reports of the existence of physical violence or its recency, frequency, or severity.

106. In the present study, parties in cases involving domestic violence could be exempted from mandatory mediation; thus, most cases involving serious violence probably were not referred to mediation. Twenty-nine percent of parties in mediation reported physical violence during their marriage; most of these said the violence was not recent, frequent, or severe. If more cases with serious violence had been in mediation, the findings might have been different.

107. See, e.g., NAT'L STANDARDS, *supra* note 17, § 1.7 cmt.; ABRAMSON, *supra* note 61, at 187-88; JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 10 (1984); Riskin & Welsh, *supra* note 31, at 897-99; Sternlight, *supra* note 56, at 273-74, 332-33, 336; Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?* 79 WASH. U. L. Q. 787, 794-95 (2001).

ensuring that parties' views are fully expressed and considered.¹⁰⁸ There is a range of views about how active a role lawyers should play in mediation, from speaking as little as possible to speaking as much as they would in bilateral negotiation or trial.¹⁰⁹ Others suggest that the appropriate role of lawyers in mediation depends on the nature of the case and the needs and preferences of the client.¹¹⁰

Procedural justice research has clearly shown that process control or "voice"—having the opportunity to present one's evidence and express one's views—is critical to parties' sense that the process is fair.¹¹¹ But few procedural justice studies—and none in the mediation context, with its greater emphasis on and expectation of direct party participation—have examined whether parties' perception of voice is different when parties express their views directly versus indirectly through a representative.¹¹² The only study to examine parties' post-experience assessments¹¹³ found that unrepresented parties felt they had a somewhat greater opportunity to express their views than did represented parties.¹¹⁴

108. See, e.g., Beck & Sales, *supra* note 2, at 1000; Lande, *supra* note 11, at 892, 894; McEwen et al., *supra* note 2, at 1327, 1354-55, 1364, 1371-74; Jacqueline M. Nolan-Haley, *Lawyers, Clients, and Mediation*, 73 NOTRE DAME L. REV. 1369, 1380-81 (1998); Tamara Relis, "It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims, 68 U. PITT. L. REV. 701, 726-27 (2007); Sternlight, *supra* note 56, at 274, 345-48, 356; Stuart & Savage, *supra* note 82, at 15; Welsh, *supra* note 107, at 787, 802-03. See generally Riskin & Welsh, *supra* note 31.

109. See, e.g., ABRAMSON, *supra* note 61, at 1, 191, 253; Arnold, *supra* note 61, at 69; Reuben, *supra* note 3, at 1096; Riskin & Welsh, *supra* note 31, at 919-21; Sternlight, *supra* note 56, at 270, 274-89, 345-49, 356-57.

110. See, e.g., ABRAMSON, *supra* note 61, at 186, 192; COOLEY, *supra* note 73, at 95; Sternlight, *supra* note 56, at 348-49, 355-67.

111. LIND & TYLER *supra* note 81, at 101-06, 215; Tyler & Lind, *supra* note 81, at 70; Wissler, *supra* note 10, at 345-46.

112. Tyler & Zimmerman, *supra* note 81, at 493-94; Welsh, *supra* note 107, at 841.

113. Two studies examined pre-experience views by asking students to indicate what procedure they thought they would prefer to use to resolve a hypothetical dispute. One study found respondents preferred a procedure in which they could present the evidence themselves; the other study found no appreciable differences but a slight preference for procedures in which a representative would present the evidence. See Stephen LaTour et al., *Procedure: Transnational Perspectives and Preferences*, 86 YALE L.J. 258, 278 (1976); Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea*, 10 PSYCHOL. PUB. POL'Y & L. 211, 243-44 (2004). These findings, however, might not shed light on parties' post-experience views of representation, as research has found that the cognitive processes used in making post-experience evaluations differ from those used in making pre-experience predictions. See *id.* at 213-14; Lind & Tyler, *supra* note 81 at 15.

114. See Tyler & Zimmerman, *supra* note 81, 491.

a. *Opportunities for Parties' Discussion and Improved Understanding*

McEwen and colleagues concluded that the presence of lawyers did not alter the nature of discussions in divorce mediation: parties still candidly expressed their emotions, had the opportunity to present their interests and listen to the other side, and engaged in a problem-solving exploration of integrative solutions.¹¹⁵ The present study of domestic relations mediation, which included some of the same courts, also found that whether mediators encouraged the parties to say how they felt, summarized what the parties said, or suggested possible options for settlement did not vary with the presence of lawyers.¹¹⁶ In other mediation contexts, however, the effect of lawyers on the nature of discussions might be different.¹¹⁷

Lawyers' presence in domestic relations mediation had mixed effects on whether parties felt that their understanding of their own needs, as well as the needs and views of others, had improved during mediation. There was no relationship between lawyers' presence and whether parties felt their understanding of their children's needs had improved.¹¹⁸ Representation had a small and mixed effect on parties' understanding of their own needs and concerns: parties who did not have a lawyer in mediation were more likely than represented parties to say that mediation helped them see their needs more clearly (48% vs. 45%), but they were also more likely to say

115. McEwen et al., *supra* note 2, at 1368, 1392-93. These findings are based on interviews with eighty-eight divorce lawyers in Maine from 1990 to 1991, plus observations of mediation sessions. *Id.* at 1358, 1373.

116. There was no effect of individual or combined representational status. Overall, mediators said they encouraged parties to say how they felt in 92% of cases, frequently summarized parties' statements in 92% of cases, and suggested settlement options in 83% of cases. A similar percentage of parties said the mediators had engaged in each of these actions. Of course, this does not mean that the parties *did* express their feelings.

117. In general civil mediation, parties' discussion of emotions, non-monetary concerns, and settlement options often appears to be restricted. *See, e.g.*, Relis, *supra* note 108, at 724-26, 733-34, 742-43; Riskin & Welsh, *supra* note 31, at 864-66, 871-76, 894-97. Because parties are almost always represented in these cases, it is not clear whether this narrowed discussion is due to the presence of lawyers, or whether it would occur even if lawyers were absent, reflecting the mediators' presumptions about what issues and options are relevant in these cases. *See, e.g.*, Dwight Golann, *Variations in Mediation: How – and Why – Legal Mediators Change Styles in the Course of a Case*, 2000 J. DISP. RESOL. 41, 61; Lande, *supra* note 11, at 880, 885; Relis, *supra* note 108, at 739; Riskin & Welsh, *supra* note 31, at 896-97. Mediators in general civil cases usually are lawyers, while mediators in domestic relations mediation often are non-lawyers. *See, e.g.*, WISSLER, TRAPPING THE DATA, *supra* note 32, at 65; Kelly, *supra* note 43, at 11, 16; Wissler, *supra* note 11, at 64; *supra* notes 34, 38.

118. There was no effect of individual or combined representational status. Overall, 41% of parties said mediation helped them see their children's needs more clearly, 57% said no change, and 2% said less clearly.

that they saw their needs less clearly (4% vs. 1%).¹¹⁹ Finally, parties were somewhat more likely to say that mediation helped them better understand the other person's views when they did not have a lawyer in mediation than when they did (69% vs. 59%).¹²⁰

In sum, representation did not seem to affect the discussion of feelings and settlement options, at least not in domestic relations mediation. Representation was related to slightly less improvement in parties' understanding of the other side's views, and had a mixed effect on parties' understanding of their own concerns.

b. Parties' Participation in Mediation and Chance to Tell Their Views

Whether representation was related to parties' sense that they had a chance to tell their views varied across studies. In the present study of domestic relations mediation, parties' representational status was not related to whether parties felt they had "enough chance" to tell their "views of the dispute."¹²¹ By contrast, unrepresented parties in a study of EEO mediation appeared to be more satisfied with the opportunity to present their side of the dispute than represented parties.¹²²

How much or how actively parties participated in mediation, or how satisfied they were with their level of participation, was greater in most studies when parties were unrepresented than when they were represented by a lawyer. In the present study of domestic relations mediation, parties' participation, as rated by the mediators, was more likely to be "very active" when neither side was represented (male party, 86%; female party, 78%) than when both sides were represented (male party, 59%; female party, 62%).¹²³ When a lawyer for only one party was present, the impact on party participation depended on whether it was the party's own lawyer or the opposing party's lawyer: parties' participation was more likely to be "very active" when only opposing counsel was present (male party, 90%; female

119. $\chi^2(2) = 8.09$, $p < .05$, $V = .10$. Unrepresented parties were less likely than represented parties to say that mediation had no effect on their ability to see their own needs (48% vs. 54%). There was no effect of the parties' combined representational status.

120. $\chi^2(2) = 5.12$, $p = .077$, $V = .079$. There was no significant effect of combined representational status.

121. There was no effect of individual or combined representational status. Overall, 87% of parties felt they "had enough chance" to tell their views.

122. The mean ratings were 4.09 and 3.64 for unrepresented and represented parties, respectively, on a five-point scale. Varma & Stallworth, *supra* note 84, at 403 tbl.3. The authors did not report a statistical significance test for this individual question, so this may or may not be a true difference.

123. Male party ($F(3, 636) = 14.40$, $p < .001$); female party ($F(3, 626) = 2.66$, $p < .05$). Overall, mediators said 66% of parties participated "very actively," 30% "somewhat actively," and only 4% "not at all actively."

party, 80%) than when only their own lawyer was present (male party, 61%; female party, 69%). Thus, parties were about equally likely to participate “very actively” when no lawyers were present as when only opposing counsel was present, and parties were about equally likely to participate “very actively” when both parties were represented as when a party’s own lawyer was present. Taken together, these findings suggest that a reduction in active party participation in the present domestic relations mediation study was associated with being represented rather than with whether the opposing party was represented.¹²⁴

Lawyers’ presence was related to parties’ “satisfaction with their level of participation” in EEO mediation. In one study, unrepresented parties appeared to be more satisfied with their level of participation than represented parties.¹²⁵ The second study, which involved the mediation of informal EEO complaints, found that charging parties were more likely to be “very satisfied” with their “level of participation in mediation” when they were unrepresented than when they were represented by a lawyer, but that there was little difference in responding parties’ satisfaction.¹²⁶ Charging parties were less likely to be “very satisfied” with their level of participation when they were represented by a lawyer than by other types of representatives, but the reverse was true for responding parties.¹²⁷ Thus, lawyers had a different effect on parties’ satisfaction with their level of participation for charging parties than for responding parties, and they had a different effect than other types of representatives. These findings suggest that it was not

124. These findings appear to contrast with those of an earlier study in some of the same courts, in which the lawyers reported they generally let their clients take the lead role in mediation and intervened only when needed. *See* McEwen et al., *supra* note 2, at 1371-73, 1392-93. Although the lawyers might have exaggerated the amount of party participation, the program director and the researchers’ observations of mediation sessions confirmed that the lawyers encouraged their clients to speak during mediation. *Id.* at 1373. Both studies are in agreement that parties participated actively in a majority of cases, even when lawyers were present.

125. The mean ratings for unrepresented and represented parties, respectively, were 4.18 and 3.76 on a five-point scale. Varma & Stallworth, *supra* note 84, at 403 tbl.3. The authors did not report a statistical significance test for this individual question, so this may or may not be a true difference.

126. Among charging parties, 76% of those who were unrepresented and 55% who were represented by a lawyer were “very satisfied” with their level of participation. Bingham et al., *supra* note 51, at 371 tbl.11. Among responding parties, 73% of those who were unrepresented and 75% represented by a lawyer were “very satisfied.” *Id.* at 372 tbl.12.

127. Among charging parties, 72% of those represented by the union and 70% represented by a co-worker were “very satisfied” with their level of participation. *Id.* at 371 tbl.11. Among responding parties, 70% of those represented by a co-worker but only 54% of those with an association representative were “very satisfied.” *Id.* at 372 tbl.12. *See supra* note 126 for the ratings of parties who were represented by lawyers.

simply having a representative, nor having a legal representative, that was related to parties' satisfaction with their level of participation in mediation.

There are several possible reasons why parties' amount of participation or satisfaction with their level of participation might be lower when they are represented and might vary across representatives. First, how much parties talk during mediation almost inevitably will be reduced when they are represented, unless their representatives remain totally silent.¹²⁸ And how much the representatives participate, or conversely, encourage their clients to participate, is likely to reflect the representatives' approach to mediation and their views of the relative benefits and risks of direct party participation, which are likely to vary with the type of case, the local legal and mediation cultures, and the representatives' experience with mediation.¹²⁹ In the EEO mediation study by Bingham and colleagues, for instance, charging parties' lawyers tended to be less familiar with transformative mediation than union representatives and responding parties' lawyers, which might have led them to participate more actively than the other representatives.¹³⁰ This likely would have violated parties' expectations about their own level of participation and reduced their satisfaction with their level of participation.¹³¹

Second, parties might feel they have less chance to tell their views or might be less satisfied with their level of participation when others are speaking for them because they have less control over what is said than when they are presenting their own views and concerns. This might be es-

128. See Bingham et al., *supra* note 51, at 373-74; Lande, *supra* note 11, at 892; McEwen et al., *supra* note 2, at 1372. Another possible explanation for the apparent reduction in participation associated with representation is that parties' representational status might be confounded with their willingness to speak in mediation. That is, parties might be more likely to hire a lawyer if they do not feel comfortable speaking in mediation, and their discomfort would also reduce their participation. But this does not seem to explain the findings regarding parties' satisfaction with their level of participation; presumably, parties who hired a representative to speak for them would have been satisfied if the representative did so. This suggests that "level of participation" might reflect parties' sense of "participation" in the mediation process in a broader sense than simply how much they spoke during the session. See *infra* notes 132-34 and accompanying text; Part I.B.3.c.

129. See Macfarlane, *supra* note 74, at 270-76; McEwen et al., *supra* note 69, at 167-68.

130. See Bingham et al., *supra* note 51, at 370, 374. Transformative mediation differs from the forms of mediation commonly used in general civil cases in its emphasis on parties' opportunity for voice and on the goals of party empowerment and mutual recognition and understanding, with settlement viewed as a possible byproduct rather than a primary objective. See Bingham & Novac, *supra* note 91, at 311.

131. See Bingham et al., *supra* note 51, at 373 (noting that the information the parties had received about the mediation program stressed the opportunity for direct party participation). However, this does not appear to explain why responding parties were much less likely to be "very satisfied" with their level of participation when they had an association representative, who presumably would have been familiar with the mediation program.

pecially likely when parties disagree with their representatives about what should be said and how, or about the relative importance of different issues.¹³² How well parties believe their representative understands their interests and objectives, and how accurately their representative communicates their views and concerns when speaking for them, may play a large role in parties' sense of voice and satisfaction with their level of participation in mediation, and is likely to vary across mediation contexts and representatives.¹³³ For instance, in the EEO mediation study by Bingham and colleagues, the pattern of findings regarding parties' satisfaction with their participation might reflect that union representatives and responding parties' lawyers were more likely than charging parties' lawyers to understand the workplace setting and to share their clients' priorities and preferences.¹³⁴

In summary, there was no consistent pattern across studies as to whether representation was related to parties' sense that they had a chance to tell their views of the dispute. The amount of parties' participation as well as their satisfaction with their level of participation generally were higher when they were unrepresented than when represented by a lawyer in mediation. Legal representation had different effects for different types of parties and had different effects than did non-legal representation, suggesting that the effects of "representation" on parties' satisfaction with their level of participation might be related to how that representation is carried out.

c. Relationships Among Voice, Participation and Assessments

As noted above, in the present domestic relations mediation study, parties were less likely to actively participate when they were represented than when they were unrepresented, but they were not less likely to feel they

132. See Bingham et al., *supra* note 51, at 353, 372-73; Relis, *supra* note 108, at 702, 725-27, 742-43 (finding that medical malpractice lawyers seldom understood their client's objectives and concerns, and these misconceptions affected how they handled cases in mediation); Riskin & Welsh, *supra* note 31, at 877-82 (illustrating differences between lawyers and clients in their understanding of the problem, and how those problem definitions affected the lawyers' approach to mediation and their client's participation in sessions); Varma & Stallworth, *supra* note 84, at 413-14; see also ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 75-76 (2000) (listing differences in preferences, incentives, and interests among the aspects of principal-agent conflict); Nolan-Haley, *supra* note 108, at 1381; Welsh, *supra* note 107, at 840, 857.

133. See, e.g., Lind et al., *supra* note 101, at 972; LIND & TYLER, *supra* note 81, at 30; Welsh, *supra* note 107, at 842-43.

134. Bingham et al., *supra* note 51, at 353, 366, 372-75. However, this does not appear to explain why responding parties were less satisfied with their level of participation when they had an association representative, who presumably would have understood the issues and shared the parties' preferences.

had enough chance to tell their views.¹³⁵ These findings seem to suggest that parties can feel they have voice indirectly through their lawyers, even when their actual participation is reduced. An additional finding seems to support this conclusion: 88% of the parties who mediators said were “not at all active” in mediation nonetheless felt they had “enough chance” to tell their views of the dispute. But drawing this conclusion from these data might not be warranted because the mediators rated the parties’ participation; that is, there might have been less of an apparent disconnect between participation and voice if the parties had rated their own level of participation as well as their sense of voice.

The present study of general civil mediation did not have this problem because the parties reported both how much chance they had to tell their views of the dispute and how much time they (and their lawyer) spoke for their side.¹³⁶ A majority of parties (77%) felt they had a considerable chance to tell their views.¹³⁷ By contrast, only a minority of parties said they spent a considerable amount of time speaking for their side (25%).¹³⁸ A majority of parties said their lawyer spent a considerable amount of time speaking for their side (64%)¹³⁹ and talked more than they did (57%).¹⁴⁰ Thus, many more parties felt a sense of voice than might be expected given the amount of time they actually talked during mediation.

Additional analyses of the present study of general civil mediation showed that, among parties who said they did not speak “at all” for their

135. See *supra* notes 121, 123 and accompanying text.

136. Parties were asked to rate both “How much chance did you have to tell your views of the dispute?” and “In speaking for your side, how much of the time did you do the talking?” each on a five-point scale from “not at all” to “a great deal.” Parties and lawyers, respectively, also were asked to rate, “In speaking for your side, how much of the time did your lawyer/your client do the talking?” on the same scale. There was a great deal of agreement in the parties’ and lawyers’ ratings.

137. Sixteen percent felt they had some opportunity to tell their views of the dispute and 8% felt they had little or no chance to tell their views.

138. Forty-five percent said they spent some time talking in speaking for their side and 30% said they spent little or no time talking.

139. Thirty-two percent said their lawyer spent some time talking; only 5% said their lawyer did little or no talking.

140. Only 11% of parties talked more than their lawyer, and 32% talked the same amount as their lawyer. These analyses considered talking “the same amount” to be when the party gave the identical ratings for how much they talked and how much their lawyer talked. Another study of general civil mediation found a similar distribution of party-lawyer participation. See CRAIG A. McEWEN, AN EVALUATION OF THE ADR PILOT PROJECT: FINAL REPORT 20 (1992) (copy on file with author). One other study found little party participation, but another found that most parties participated actively. See KEITH SCHILDT ET AL., MAJOR CIVIL CASE MEDIATION PILOT PROGRAM: 17TH JUDICIAL CIRCUIT OF ILLINOIS, PRELIMINARY REPORT (1994), available at <http://caadr.org/downloads/niustudy.pdf>; Stevens H. Clarke & Elizabeth Ellen Gordon, *Public Sponsorship of Private Settling: Court-Ordered Civil Case Mediation*, 19 JUST. SYS. J. 311, 319 (1997).

side during mediation, 50% nonetheless felt they had a considerable chance to tell their views of the dispute.¹⁴¹ Among parties who said their lawyer spoke “a great deal” for their side during mediation, 77% felt they had a considerable chance to tell their views of the dispute.¹⁴² Not surprisingly, among parties who said they spent a “great deal” of time speaking for their side, 91% said they had a considerable chance to tell their views. Thus, although talking a lot virtually guaranteed that parties felt they had voice, not talking at all, or having a lawyer who talked a great deal, did not prevent a substantial number of parties from feeling they had a chance to tell their views. These findings suggest that parties can feel they have voice through their lawyers. It is not clear, however, why some parties who did not talk in mediation felt they had voice while others did not; perhaps it made a difference whether parties preferred not to talk and wanted their lawyer to speak for them, or whether they were “shut down” by their lawyers, the mediator, or the other side.¹⁴³

Because representation generally was associated with less party participation but not necessarily with parties’ feeling that they had less chance to tell their views, additional analyses were conducted to examine how party participation and sense of voice are related to parties’ assessments of mediation. In the present domestic relations mediation study, parties who said they had “enough chance” to tell their views were more likely to feel the process and outcome were fair and to feel less pressured to settle than were parties who said they did not have enough chance to tell their views.¹⁴⁴ By contrast, how actively parties participated in domestic relations mediation was not related to their assessments of the fairness of the process or outcome,¹⁴⁵ and parties who participated more actively tended to feel more

141. Nineteen percent felt they had some chance to tell their views and 31% felt they had little or no chance.

142. Fourteen percent felt they had some chance to tell their views and 8% felt they had little or no chance.

143. See Macfarlane & Keet, *supra* note 68, at 692 (finding that parties in general civil mediation were disappointed and frustrated when their lawyers took over the session or instructed them “to keep quiet and leave the talking to counsel”). Parties said they wanted “to be ‘supported’ but not ‘shut down’ by their lawyers” during mediation. *Id.* at 693; see also LaTour et al., *supra* note 113 at 273-74 (noting that lawyers’ presentation of the case could enhance parties’ voice if parties feel their lawyer can present their case better than they can); McEwen et al., *supra* note 2, at 1363 (noting that some clients want their lawyer to speak for them); Riskin & Welsh, *supra* note 31, at 875-76, 894-95, 907-98 (describing problems that arise when lawyers shut their clients out of mediation sessions entirely).

144. Process fair, $r(821) = .364, p < .001$; settlement fair, $r(668) = .193, p < .001$; pressure to settle, $r(833) = -.242, p < .001$.

145. See also Susan J. Rogers & Claire Francy, *Communication in Mediation: Is More Necessarily Better?* MEDIATION Q. 39, 45-47 (Winter 1988) (finding that how much unrepresented parties talked in community mediation was not related to their satisfaction with mediation or to whether settlement was achieved or the agreement endured). The research-

pressured to settle than those who participated less actively.¹⁴⁶ These contrasting findings seem to suggest that parties' sense of voice is more important to their experience in mediation than is how much they participate.¹⁴⁷

In the present general civil mediation study, parties' having more chance to tell their views and speaking more for their side were both related to seeing mediation as more fair as well as having more favorable assessments of mediation on most dimensions (see the first and second columns of coefficients in Table 2).¹⁴⁸ But parties' sense of voice was much more strongly related to their assessments than was their amount of participation, which is similar to the pattern seen above in the present domestic relations study. Settlement pressure was an exception: feeling one had more chance to tell one's views was associated with feeling *less* pressured to settle, but talking more was associated with feeling *more* pressured to settle. Whether parties talked more than their lawyer in speaking for their side showed a pattern of even smaller and less consistent relationships with parties' assessments of mediation than did the absolute amount parties talked (see the third column of coefficients in Table 2). Notably, talking more than one's lawyer was not related to parties' views of fairness of the process or outcome, and parties who talked more than their lawyer felt more pressured to settle than parties who talked less than their lawyer.

ers suggested that the nature of the interaction and discussions might be more important to parties' views of mediation and the mediation outcome than the amount of discussion. *Id.* at 48.

146. Female parties, $r(385) = .115, p < .05$; male parties, $r(363) = .087, p = .097$.

147. Two caveats: First, the direction of these relationships cannot be discerned from correlations. That is, one cannot tell whether parties' having more chance to tell their views led to more favorable assessments of mediation, or whether a more fair process involving less settlement pressure gave parties more chance to tell their views. Second, the relative strength of the relationships for participation and voice might be an artifact of the fact that the mediators rated the parties' participation; the correlations involving participation might have been stronger if the parties had rated their own level of participation.

148. Parties rated both their sense of voice and how much they participated. *See supra* note 136 and accompanying text; *see also* Lind et al., *supra* note 101, at 969, 972 (finding that, in a variety of dispute resolution processes other than mediation, tort litigants' sense of control over the way their case was handled was strongly related to procedural fairness judgments, while how much they felt they "participated in the process of disposing" of their case was not).

Table 2. Relationships Between Measures of Party and Lawyer Participation and Parties' Assessments of General Civil Mediation

Parties' Assessments	Chance to tell views	Amount party talked	Party talked more than lawyer	Amount lawyer talked
Had chance to tell views	—	.307***	.230***	<i>n.s.</i>
Fair process	.422***	.089***	<i>n.s.</i>	.067*
Mediator was impartial	.324***	.047 ⁺	<i>n.s.</i>	<i>n.s.</i>
Mediator understood views	.391***	.136***	.046 ⁺	.076**
Treated with respect	.261***	<i>n.s.</i>	-.035 ⁺	.097**
Not pressured by mediator	.043*	-.061*	-.110***	.104***
Not pressured by other side	.076***	-.053*	-.106***	.112***
Had input into outcome	.345***	.210***	.109***	.062*
Understood other's views	.193***	.085***	<i>n.s.</i>	.072***
Understood own case	.152***	.097**	<i>n.s.</i>	.122***
Satisfaction with process	.255***	.054**	<i>n.s.</i>	.050*
Recommend mediation	.270***	.072**	<i>n.s.</i>	.088***
Fair settlement	.185***	.059 ⁺	<i>n.s.</i>	.068 ⁺

Notes: The measures of participation were based on parties' ratings. Positive Pearson correlation coefficients indicate that more participation is associated with more favorable assessments; negative coefficients indicate that more participation is associated with less favorable assessments.

⁺ $p < .10$; * $p < .05$; ** $p < .01$; *** $p < .001$ *n.s.* = not statistically significant

Parties' assessments of mediation generally were more favorable when their lawyers spoke more for their side than when their lawyers spoke less (see the fourth column of coefficients in Table 2). Although the relationships were small, how much one's lawyer talked was significantly related to more assessments of mediation than was whether parties talked more than their lawyer. Notably, parties who said their lawyer talked more felt *less* pressured to settle than did parties who said their lawyer talked less, which is opposite the direction of the relationship between pressure and how much the parties talked.¹⁴⁹ And how much their lawyer talked was not

149. Perhaps mediators direct their reality testing at parties when they participate more actively, but at lawyers when they participate more. And perhaps lawyers' potential to act as a buffer from the other side is related to how much they participate, both in absolute

related to whether parties felt they had enough chance to tell their views, suggesting that it is something other than how much their lawyer talks that contributes to parties' sense of voice.

In summary, although direct party participation in mediation was related to parties' sense of voice, a substantial number of parties who did not participate directly nonetheless felt they had a considerable chance to tell their views. Thus, parties can feel they have voice through their lawyers, though not all do. Parties' sense that they had a chance to tell their views was more strongly related to favorable assessments of mediation than was how much they participated. Thus, ensuring that parties feel they have a chance to fully express their views appears to be more important to their experience in mediation than how much they participate directly.

4. *Does Representation Make the Mediation Process More or Less Contentious?*

Many assume the presence of lawyers makes the mediation process more adversarial, polarized, and contentious, thereby exacerbating conflict and reducing the opportunity for constructive problem solving and improved party relationships.¹⁵⁰ Some commentators maintain instead that lawyers dampen the level of conflict in mediation because they are not emotionally involved in the dispute, are trained to evaluate issues rationally, are likely to have a more realistic assessment of the probable outcome than their clients, and often need to maintain a reputation for cooperation with opposing counsel.¹⁵¹ Others note that whether lawyers increase or decrease con-

terms and relative to their clients. See, e.g., LaTour et al., *supra* note 113, at 273-74 (suggesting that representatives might serve as a buffer by reducing direct interaction between the parties).

150. See, e.g., ALFINI ET AL., *supra* note 22; Ronald J. Gilson & Robert H. Mnookin, *Cooperation and Competition in Litigation: Can Lawyers Dampen Conflict?*, in BARRIERS TO CONFLICT RESOLUTION 184, 185 (Kenneth J. Arrow et al. eds., 1995); MACFARLANE, *supra* note 61, at 148; McEwen et al., *supra* note 2, at 1364, 1373; John Lande, *Practical Insights From an Empirical Study of Cooperative Lawyers in Wisconsin*, 2008 J. DISP. RESOL. 203, 249-50 (reporting lawyers' perceptions of lawyers' and parties' mindsets in litigation-oriented, cooperative, and collaborative practices); Nolan-Haley, *supra* note 108, at 1380; Reuben, *supra* note 3, at 1097 (quoting the Supreme Court decision in *Gagnon v. Scarpelli*, that counsel "would inevitably give the proceedings a more adversary cast"); Riskin, *supra* note 80, at 330.

151. HERBERT M. KRITZER, RISK, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 119-28 (2004) [hereinafter KRITZER, RISK, REPUTATIONS, AND REWARDS]; DEAN G. PRUITT & PETER J. CARNEVALE, NEGOTIATION IN SOCIAL CONFLICT 154-56 (1993); Gilson & Mnookin, *supra* note 150, at 209. Although lawyers' analytic tendencies might reduce contentiousness during mediation, they also can lead lawyers to overlook or reframe the emotional issues and objectives that often are important to parties. See Relis, *supra* note 108, at 702, 725-27, 733-34; Riskin & Welsh, *supra* note 31, at 889.

tentiousness in mediation might depend on how they react to their clients' positions and expectations and how they choose to advocate for their clients in mediation.¹⁵² Some suggest that the dynamics of the mediation process itself and its face-to-face nature demand civility and make posturing more difficult, limiting adversarial behavior.¹⁵³ If parties in cases involving more intense conflicts are more likely to hire lawyers, the presence of lawyers might be associated with greater contentiousness in mediation, not because of anything the lawyers do, but because of the more acrimonious nature of the underlying dispute.¹⁵⁴

McEwen and colleagues concluded that most lawyers were not aggressively adversarial in divorce mediation.¹⁵⁵ In the present domestic relations mediation study, which included some of the same courts, only indirect measures were available to examine the effect of lawyers on the tone of mediation. First, parties' assessments of whether their dealings with each other regarding their children would improve as a result of mediation were examined: presumably, the more contentious the mediation, the less likely parties would predict their dealings would improve. Parties who did not have a lawyer in mediation were more likely than parties who had a lawyer to say that their dealings with each other regarding the children would improve (41% vs. 35%), but they were also more likely to say that their dealings would worsen (16% vs. 10%) as a result of mediation.¹⁵⁶ Second, the effect of representation on whether opposing parties in the same case had similar or divergent perceptions of mediation was examined: presumably, the more adversarial and polarized the mediation session, the more parties' views would diverge.¹⁵⁷ Neither the parties' individual nor their combined

152. MNOOKIN ET AL., *supra* note 132, at 156, 166-70; Beck & Sales, *supra* note 2, at 1028; Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 986 (1979); Sternlight, *supra* note 56, at 291-97. Lawyers who have more experience with mediation are more likely to consider not only the interests and perspectives of their client but also of the other side. See Macfarlane, *supra* note 74, at 297, 300; McEwen et al., *supra* note 2, at 1367.

153. McEwen et al., *supra* note 2, at 1368-69.

154. See, e.g., ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 108-12 (1992) (noting that parties who were more willing to fight and whose preferences were more in conflict with the other side's would be more likely to seek legal counsel).

155. McEwen et al., *supra* note 2, at 1368-69.

156. $\chi^2(2) = 6.25$, $p < .05$, $V = .097$. Unrepresented parties were less likely to say there would be no change in their dealings with the other parent than were parties with a lawyer (43% vs. 54%). Parties' ratings were not related to their combined representational status.

157. In small claims cases, opposing parties had more divergent perceptions of the fairness of the process and the outcome following trial than mediation; trial was seen as more adversarial than mediation on several dimensions. See Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 258-59 (1981); Wissler, *supra* note 10, at 335-36, 344. This may be because adversarial

representational status was related to how similar or divergent their assessments of the mediator, the process, or the outcome were on most dimensions. The one exception was that parties' views of the mediator's neutrality diverged less when the parties had a lawyer than when they did not.¹⁵⁸

These limited findings suggest that the presence of lawyers neither substantially increased nor decreased the adversarialness or contentiousness of mediation. This conclusion, however, might be confined to the domestic relations context, in which most lawyers engage in cooperative problem solving rather than adversarial posturing.¹⁵⁹ The professional norm of the "reasonable lawyer" who tries to reduce conflict and facilitate settlement¹⁶⁰ likely developed due to several aspects of family law practice: the substantive legal rules, policies, and economic incentives; the more active and direct involvement of clients in the negotiation process; and the local and specialized nature of the family law bar.¹⁶¹ Additional evidence suggests that divorce practice became less adversarial after mediation use became common.¹⁶²

To the extent that these same factors operate in other practice areas, or that the structure of the mediation process itself or greater experience with mediation reduces lawyers' adversarial tendencies within the mediation session, these findings might not be unique to domestic relations media-

processes tend to focus more on who is right and who is wrong, so that parties are more likely to feel there is a winner and a loser. The difference between winners' and losers' process assessments has been found to be greater following trial and arbitration than following mediation, settlement conference, and bilateral negotiation. See Lind et al., *supra* note 101, at 956, 971, 975; Wissler, *supra* note 10, at 344.

158. Female parties: $F(1, 303) = 8.42, p < .01$; male parties: $F(1, 301) = 3.69, p = .056$.

159. McEwen et al., *supra* note 2, at 1365-67 (discussing several studies finding that most divorce lawyers reduced rather than sparked conflict). But see Schneider & Mills, *supra* note 94, at 616-17 (finding that, in bilateral negotiation, family practice lawyers were more likely to use an ethically adversarial style than lawyers in civil practice, and the two groups were about equally likely to use an unethically adversarial style).

160. McEwen et al., *supra* note 2, at 1365.

161. MATHER ET AL., *supra* note 3, at 130-31. "The resulting legal framework thus provided few incentives for divorce lawyers in most cases to try to 'win big' for their clients." *Id.* at 131. Interviewed lawyers saw their main goal as reaching a settlement fair to both sides, and many started negotiations with an offer near what they thought would be a fair outcome. *Id.* at 114-17; see also McEwen et al., *supra* note 2, at 1366-67.

162. McEwen et al., *supra* note 2, at 1367. This study made comparisons between Maine, where court-connected mediation had been mandatory for approximately five years, and New Hampshire, where there was no court-mandated mediation. Divorce lawyers in Maine, compared to those in New Hampshire, were significantly more likely to agree that the goal of negotiation was "reaching a settlement fair to both parties" rather than "getting as much as possible for their client." And the volume of motions filed in divorce cases dropped by 20% in Maine while increasing by 20% to 30% in New Hampshire during the same time period. *Id.*

tion.¹⁶³ For instance, Kritzer's research suggests that some of these factors—repeated contact with opposing counsel and economic incentives favoring efficient resolution—also operate in routine personal injury contingency fee cases to produce a norm of cooperation and reciprocity.¹⁶⁴ In bilateral negotiations in these cases, most lawyers made initial demands and offers that were not extreme and did not employ “scorched earth” tactics, suggesting that a cooperative style predominated.¹⁶⁵ In the present general civil mediation study, a majority of lawyers (67%) said that opposing counsel was highly cooperative in mediation, and only 7% said opposing counsel was uncooperative.¹⁶⁶ These findings suggest that, even in contexts other than domestic relations, lawyers might not substantially increase the contentiousness of mediation.

Because virtually all parties are represented in general civil mediation, the effect of representation on the tone of mediation cannot be assessed, but the effect of how adversarial or cooperative lawyers are during mediation can be examined. Parties in one study were frustrated and dissatisfied when their lawyers adopted an adversarial approach in mediation, created a win/lose atmosphere, or were reluctant to negotiate.¹⁶⁷ In the present study, parties' assessments of mediation on some, but not all, dimensions were related to how cooperative their lawyers said opposing counsel was in mediation,¹⁶⁸ though the relationships generally were small (see Table 3). Where opposing counsel was more cooperative, parties felt they had more input into the outcome and had a better understanding of their own case and the other side's views, and thought that the mediation process was more fair and the mediator had a better understanding of their views. However,

163. See Gilson & Mnookin, *supra* note 150, at 203-05, 208-09 (noting that lawyers' level of cooperation varies across practice areas as a result of how much opportunity there is to develop a reputation for cooperation, such as whether there tend to be opportunities for tradeoffs in settlements or whether the size of the legal community permits repeated interactions among the lawyers); Macfarlane, *supra* note 74, at 315, 318 (finding that differences in civil litigators' approaches to mediation were related to their amount of personal experience with mediation and the local legal culture, including the size and cohesiveness of the bar).

164. HERBERT M. KRITZER, LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION 105, 122, 129, 133 (1991) [hereinafter KRITZER, LET'S MAKE A DEAL]; KRITZER, RISK, REPUTATIONS, AND REWARDS, *supra* note 151, at 129-31, 234.

165. KRITZER, LET'S MAKE A DEAL, *supra* note 164, at 77, 105, 118-25, 131-33; KRITZER, RISK, REPUTATIONS, AND REWARDS, *supra* note 151, at 130-31, 153-55. See also Schneider & Mills, *supra* note 94, at 616 (finding that 68% of lawyers in civil practice, compared to 61% in family practice, used either a true or a cautious problem-solving approach in bilateral negotiations, rather than an adversarial approach).

166. Twenty-six percent said opposing counsel was somewhat cooperative.

167. Macfarlane & Keet, *supra* note 68.

168. Lawyers were asked to rate “Was the opposing counsel cooperative in the mediation of this case?” on a five-point scale, from “not at all” to “a great deal.”

when opposing counsel was more cooperative, parties saw the mediator as somewhat *less* impartial than when opposing counsel was less cooperative. And cooperation was not related to parties' sense of voice, settlement pressure, or respectful treatment by the mediator. Notably, the more cooperative the lawyers were during mediation, the more likely the case was to settle.¹⁶⁹

Table 3. Relationships Between Lawyers' Level of Cooperation and Parties' and Lawyers' Assessments of General Civil Mediation

Parties' Assessments			
Fair process	.065 [*]	Treated with respect	<i>n.s.</i>
Mediator was impartial	-.065 ⁺	Not pressured by mediator	<i>n.s.</i>
Chance to tell views	<i>n.s.</i>	Not pressured by other side	<i>n.s.</i>
Input into outcome	.142 ^{***}	Understood other's views	.099 ^{**}
Mediator understood views	.062 [*]	Understood own case	.127 ^{***}
Recommend mediation	.092 [*]	Satisfaction with process	.117 ^{**}
Lawyers' Assessments			
Fair process	.430 ^{***}	Mediator effective	.335 ^{***}
Mediator impartial	.186 ^{***}	Parties' relationship	.316 ^{***}
Party involvement	.308 ^{***}	Lawyers' relationship	.334 ^{***}
Recommend mediation	.330 ^{***}	Evaluate other's case	.204 ^{***}
Fair settlement	.370 ^{***}	Evaluate own case	.182 ^{***}

Notes: Positive Pearson correlation coefficients indicate that more cooperation is associated with more favorable assessments; negative coefficients indicate that more cooperation is associated with less favorable assessments.

⁺ $p < .10$; ^{*} $p < .05$; ^{**} $p < .01$; ^{***} $p < .001$; *n.s.* = not statistically significant

169. $r = .253$, $p < .001$. See also Gilson & Mnookin, *supra* note 150, at 209 (stating that the relationship between opposing counsel has "profound implications" for whether lawyers can reduce conflict and facilitate settlement).

For lawyers, greater cooperation in mediation from opposing counsel was consistently and strongly related to more favorable assessments of mediation (see Table 3).¹⁷⁰ Notably, lawyers who said opposing counsel was more cooperative thought that the mediation process was more fair and that the mediator was more impartial, that parties had more involvement in resolving the dispute, and that the parties' relationship improved more than did lawyers who faced less cooperative opposing counsel. Moreover, in cases that reached a full or partial settlement in mediation, lawyers thought the settlement was more fair when opposing counsel was more cooperative.

In sum, the limited research findings suggest that the presence of lawyers neither substantially increased nor decreased the contentiousness of mediation, at least in domestic relations cases. Nonetheless, *how* the lawyers interacted during general civil mediation made a difference to the mediation process and outcome. When lawyers were less adversarial and more cooperative during mediation, the parties, and especially the lawyers, generally viewed the process and outcome more favorably, and the case was more likely to settle.

C. What Effect Does Representation Have on Mediation Outcomes?

1. Does Representation Facilitate or Impede Settlement?

There are contrasting predictions about the effect that lawyers will have on settlement in mediation. Lawyers' greater skill and experience with negotiation could facilitate settlement.¹⁷¹ If lawyers prepare clients for mediation, that could make settlement more likely.¹⁷² Lawyers also could increase the likelihood of settlement because they are less likely than parties to be susceptible to cognitive biases, and thus are able to help their clients overcome cognitive barriers to settlement.¹⁷³ If lawyers are aggressively adversarial and exacerbate the parties' conflict, that could reduce the likelihood of settlement; but if lawyers are cooperative and able to calm their clients' emotions, that could facilitate settlement.¹⁷⁴ If lawyers ensure that

170. It is not clear why the degree of cooperation was more strongly and more consistently related to lawyers' than to parties' assessments. The correlations between parties' assessments and cooperation might be attenuated because they involve parties' ratings of the process but lawyers' ratings of cooperation; perhaps what looked like cooperation to the lawyers did not look cooperative to the parties. Or perhaps parties are less affected than lawyers by opposing counsel's tone.

171. See, e.g., MNOOKIN ET AL., *supra* note 132, at 71.

172. See *supra* note 74 and accompanying text.

173. See, e.g., Sternlight, *supra* note 56, at 320-29; Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 79-86 (1997).

174. See *supra* note 169 and accompanying text.

parties' views are expressed and their concerns are addressed, that could encourage settlement; but if they stifle party participation and limit discussions, that could hinder settlement.¹⁷⁵ If lawyers buffer settlement pressures from the mediator and the opposing side, and advise their clients to reject unfair proposals, the settlement rate might decrease; but lawyers themselves might push clients to settle.¹⁷⁶

Settlement was more likely when both parties were unrepresented than when both were represented. One domestic relations mediation study found that a full or partial settlement was more likely when neither party had a lawyer present during mediation than when one or both parties' lawyers attended.¹⁷⁷ The present domestic relations study found that full settlement was more likely when neither party (58%) or only one party (56%) had a lawyer present in mediation than when both parties had a lawyer present (44%).¹⁷⁸ Partial settlement, however, was more likely when both parties had lawyers present (39%) than when only one party or neither party had a lawyer present (22% each).¹⁷⁹ An EEO mediation study also found a similar pattern: the settlement rate was highest when both parties were unrepresented, intermediate when only one party was represented, and lowest when both parties were represented in mediation.¹⁸⁰

Two other EEO mediation studies that examined the effect of representation separately for each party found a different effect for charging parties than for responding parties. One study found that charging parties who were unrepresented settled at a higher rate than those represented by a lawyer, but found no differences by representational status for responding par-

175. See *infra* note 185 and accompanying text; see also Riskin & Welsh, *supra* note 31, at 901.

176. See *infra* notes 204-205 and accompanying text.

177. The settlement rate was 75% and 48%, respectively. Stuart & Savage, *supra* note 82. The findings are based on 307 domestic relations cases mediated in a multi-door courthouse program in 1996 and 1997 in Arapahoe County, Colo. *Id.*

178. $\chi^2(4) = 16.48$, $p < .01$, $V = .160$. The rate of non-settlement was similar across representation groups (17% to 22%). When only one party had a lawyer present, which party's lawyer was present affected the likelihood that full settlement was reached (male party, 45%; female party, 62%).

179. When responses referring to a mediation session other than the final one were included in the analysis, 27% of parties whose lawyers were not present scheduled another session, presumably so they could consult with their lawyers in the interim, compared to only 7% of unrepresented parties and 8% of represented parties whose lawyers were present. These findings suggest that the practice of lawyers not attending mediation could add delay and expense to the mediation process in some cases by postponing settlement or necessitating an additional mediation session.

180. The settlement rate was 68%, 45%, and 31%, respectively. MCEWEN, *supra* note 49, at 42-43. When only one party was represented, the settlement rate was higher when the responding party was represented (53%) than when the charging party was represented (39%). *Id.* at 42-43, 50.

ties.¹⁸¹ The study involving the mediation of informal EEO complaints found that charging parties were more likely to settle when unrepresented than when represented by a lawyer, but that the reverse was true for responding parties.¹⁸² Comparing unrepresented parties to parties who had non-lawyer representatives showed that, for both charging and responding parties, the settlement rate was either about the same or higher for represented parties, depending on the type of representative.¹⁸³ Charging parties were less likely to settle when they were represented by a lawyer than by other types of representatives; for responding parties, the pattern varied depending on the type of non-lawyer representative. Thus, lawyers had a different effect on settlement for charging parties than for responding parties, and lawyers had a different effect on settlement than did other types of representatives. These findings suggest that it is something about the nature of the representation, not simply having a representative or having a legal representative, that affects settlement.

What might account for the apparent reduction in the likelihood of settlement associated with the presence of lawyers in most studies? Perhaps lawyers advised their clients to reject settlement proposals, so that unrepresented parties accepted more settlement proposals than represented parties. Unfortunately, we lack the information needed to explore this possibility, namely, the rate at which represented and unrepresented parties received and then either accepted or rejected settlement proposals.¹⁸⁴ Perhaps the presence of lawyers changed the mediation process in ways that in turn reduced the likelihood of settlement. In the present domestic relations mediation study, for instance, representation was associated with somewhat less improved understanding of the other side's views and with reduced party participation, both of which were related to a lower rate of settlement.¹⁸⁵ In

181. McDermott & Ervin, *supra* note 82, at 57-59. The findings of this study are based on questionnaires completed by 1,683 charging parties and 1,572 responding parties after mediations that were conducted under the supervision of the fifty EEOC field offices during a five-month period. *Id.* at 50-52. This study did not report the type of representative, but presumably most were lawyers since these were formal EEOC complaints. See *supra* note 50 and accompanying text.

182. The rate of full and partial settlement for charging parties was 62% when unrepresented and 50% when represented by a lawyer. For responding parties, the settlement rate was 63% when unrepresented and 67% when represented by a lawyer. Bingham et al., *supra* note 51, at 365-68.

183. For charging parties, the settlement rate was 60% when represented by a fellow employee and 65% when represented by the union. For responding parties, the settlement rate was 78% when represented by an association representative and 64% when represented by a fellow employee. *Id.*

184. We would need additional information to determine whether lawyers advised clients to reject proposals because the proposals were unfair or for other reasons.

185. See *supra* notes 120, 123 and accompanying text. Participation and settlement, $r(628) = .123, p < .01$; understanding and settlement, $r(838) = .234, p < .001$.

one EEO mediation study, when comparing charging parties who were unrepresented with those represented by a lawyer, the pattern of differences in their satisfaction with their level of participation was similar to the pattern of differences in their settlement rates.¹⁸⁶ But these parallel patterns for satisfaction with participation and settlement were not seen for responding parties.¹⁸⁷ Thus, although a lower settlement rate might in part reflect possible changes in the mediation process associated with the presence of lawyers, that does not appear to be the sole explanation.

Another possible explanation for the apparent reduction in settlement associated with the presence of lawyers is that case characteristics related to settlement are likely to be confounded with parties' representational status. That is, cases in which parties are more likely to seek and to be able to retain a lawyer might have certain characteristics, such as involving larger, stronger, or more complex claims, or involving greater contentiousness or disparity between positions,¹⁸⁸ that tend to reduce the likelihood of settlement.¹⁸⁹ EEO mediators rated cases in which both parties had representation as involving more complex legal issues and a stronger substantive

186. See *supra* notes 126, 182 and accompanying text.

187. See *supra* notes 126, 182 and accompanying text. In addition, responding parties who had an association representative were least likely to be "very satisfied" with their level of participation, but most likely to settle. See *supra* notes 127, 183 and accompanying text.

188. See, e.g., KRITZER, LEGAL ADVOCACY, *supra* note 3, at 33, 82 (noting that parties might be more likely to hire a lawyer in more problematic cases, and lawyers might be more likely to take cases with more merit or stronger evidence); KRITZER, RISK, REPUTATIONS, AND REWARDS, *supra* note 151, at 84-85 (finding that lawyers' decisions whether to take cases were strongly influenced by the potential for liability); MACCOBY & MNOOKIN, *supra* note 154, at 108-12 (noting that parties who were more willing to fight, for whom the outcome was more important, or whose preferences were more in conflict with the other side's would be more likely to seek legal counsel); SALES ET AL., *supra* note 3, at 8-12 (finding that unrepresented litigants had less complex divorce cases); Bingham et al., *supra* note 51; McDermott & Ervin, *supra* note 82, at 59; Stuart & Savage, *supra* note 82. But see Leandra Lederman & Warren B. Hrunig, *Do Attorneys Do Their Clients Justice? An Empirical Study of Lawyers' Effects on Tax Court Litigation Outcomes*, 41 WAKE FOREST L. REV. 1235, 1261 (2006) (finding that cases where the taxpayer had a lawyer were weaker overall). Similarly, the type of representative that parties choose might be associated with characteristics of the case or with what they want from a representative. See Bingham et al., *supra* note 51, at 354-55.

189. See, e.g., Monsma & Lempert, *supra* note 94, at 630, 642, 661 (noting that any examination of the effect of representation on case outcomes "must consider how clients acquire or fail to acquire counsel, for outcomes apparently associated with counsel may in fact be consequences of factors that led to the acquisition of counsel" and that "case or other characteristics may suppress or distort the relationship between legal representation and case outcomes"); see also Roselle L. Wissler, *The Role of Antecedent and Procedural Characteristics in Mediation: A Review of the Research*, in THE BLACKWELL HANDBOOK OF MEDIATION: BRIDGING THEORY, RESEARCH, AND PRACTICE 129, 130-31 (Margaret S. Herrman ed., 2006) (reviewing research findings on the relationships between case characteristics and settlement).

showing of discrimination than cases in which one party was represented, which in turn were rated as more complex and having more evidence of discrimination than cases in which neither party was represented.¹⁹⁰ Moreover, the pattern of differences in these case characteristics across representational status categories was similar to the pattern of settlement rate differences across representational categories.¹⁹¹ Thus, fewer cases might have settled in EEO mediation when both parties were represented because those cases involved stronger and more complex claims, not because lawyers were present in mediation.

In the present domestic relations study, several characteristics associated with representation also were related to settlement. Represented parties had higher incomes,¹⁹² were married for a longer time,¹⁹³ and were more likely to say that they tried to resolve financial issues during mediation (e.g., division of property, alimony, debts)¹⁹⁴ than unrepresented parties.¹⁹⁵ These case characteristics were related to settlement in a way that largely paralleled the relationships between representation and settlement.¹⁹⁶ That is, cases in which the parties discussed financial issues during mediation,¹⁹⁷

190. MCEWEN, *supra* note 49, at 43 (concluding that “[i]t is probable that representation of parties reflects something about the nature of the charges themselves as well as the orientation of parties toward the charge, one another, and settlement”).

191. *See supra* note 180 and accompanying text.

192. $r(805) = .184, p < .001$. The parties’ combined representational status also was related to their combined income ($\chi^2(8) = 21.33, p < .01; V = .279$). In cases with the highest combined income, both parties were most likely to be represented, whereas in cases with the lowest combined income, one or both parties were most likely to be unrepresented. This relationship could reflect either the amount at stake or the parties’ ability to pay. *See infra* note 225 and accompanying text.

193. $r(839) = .095, p < .01$. The parties’ combined representational status, however, was not related to the length of their marriage. Length of marriage is an indicator of case complexity, as shorter marriages tend to be associated with no children and less property. *See SALES ET AL., supra* note 3, at 11.

194. $\chi^2(1) = 16.25, p < .001, V = .139$; represented parties, 38%; unrepresented parties, 57%. In this program, all contested issues, including property and financial issues, could be resolved. This relationship could reflect either that parties with disputed financial issues were more likely to hire a lawyer, or that having a lawyer led to the identification of financial issues that the parties otherwise might not have raised. The parties’ combined representational status also was related to whether financial issues were discussed in mediation ($\chi^2(2) = 24.04, p < .001, V = .193$). Financial issues were more likely to be discussed when both parties were represented (54%) than when neither party or one party was represented (30% and 34%, respectively).

195. Representation was not related to several other potential indices of case complexity: the number of factors involved in the case (e.g., stepparents, claims of substance abuse), the number of issues relating to the children that the party tried to resolve in mediation, or whether there was physical violence and its frequency, recency, or severity.

196. *See supra* notes 178-79 and accompanying text.

197. $\chi^2(2) = 35.71, p < .001, V = .235$.

had higher incomes,¹⁹⁸ and were married longer¹⁹⁹ were less likely to reach a full settlement, but more likely to reach a partial settlement, than were cases in which the parties did not discuss financial issues, had lower incomes, or were married fewer years. A series of additional analyses found that the effect of representation on settlement was greatly reduced when case characteristics were taken into consideration,²⁰⁰ suggesting that much of the observed relationship between representation and settlement was due to the effect of case characteristics associated with representation.

In sum, lawyers' presence in mediation correlated with a lower rate of settlement in most, but not all, studies. This might reflect some changes in the mediation process associated with the presence of lawyers or with how lawyers or other representatives conducted their representation during mediation. But the settlement rate might be due as much or more to the effect of case characteristics associated with representation than to any impact lawyers had on the mediation process.

2. *Does Representation Lead to Better or More Fair Settlements?*

Most of the research that has examined the effect of representation on outcomes, often finding better outcomes for represented than unrepresented parties, has looked only at trial or administrative hearing decisions.²⁰¹ By contrast, a study of negotiated outcomes found no effect of representation on outcomes in settled tax cases.²⁰² Perhaps lawyers play a different role in, and have different effects on, case outcomes that result from the parties' agreements rather than from a third-party decision.

198. $\chi^2(10) = 24.18, p < .01$.

199. $r(307) = -.114, p < .05$.

200. To briefly summarize the findings of this set of analyses: When the case characteristics were held constant, representational status did not consistently have a statistically significant relationship with settlement, nor did it show the same pattern at all levels of each of the case characteristics. Similarly, when representational status was held constant, the case characteristics did not consistently have a statistically significant relationship with settlement, nor did they show the same pattern at all levels of representation. In addition, when representational status was added to a multiple regression equation in which case characteristics had already been entered, representational status added a statistically significant, but very small, contribution to explaining settlement over and above the effect of case characteristics. The same was true when the case characteristics were added to an equation containing representational status.

201. See generally Engler, *supra* note 5.

202. Lederman & Hrungr, *supra* note 188, at 1239, 1264 (noting their results might suggest that "the same specialized training critical for making a case in court is not required for negotiations").

In mediation, lawyers are thought to act “as a crucial check against uninformed and pressured settlements.”²⁰³ If lawyers discourage their clients from agreeing to unfair or unwise proposals, or push the other side to improve their proposals, represented parties would achieve more fair or more favorable mediated agreements than unrepresented parties.²⁰⁴ Lawyers, however, may not sufficiently understand or value their clients’ interests, or they may urge clients to accept or reject proposals that are more in line with their own preferences or financial and reputational interests than with those of their clients. If so, then represented parties would be less likely than unrepresented parties to achieve their preferred or optimal outcome.²⁰⁵

In some jurisdictions and mediation contexts, mediators may educate parties about the consequences of settlement proposals or have a duty to raise questions about the fairness of proposals and to terminate mediation if they feel the settlement would be unconscionable.²⁰⁶ To the extent that

203. NAT’L STANDARDS, *supra* note 17, §§ 1.4, 11.3 & cmts.; *see also*, COOLEY, *supra* note 73, at 49; MACFARLANE, *supra* note 61, at 216-18; Ross Dolloff & Patricio Rossi, *Mediation Project Gets Results for North Shore Tenants*, 16 LEGAL SERVICES REP. 1, 11-12 (May 2006); McDermott & Ervin, *supra* note 82; McEwen et al., *supra* note 2, at 1327, 1360-61; Reuben, *supra* note 3, at 1098; Stuart & Savage, *supra* note 82.

204. *See, e.g.*, MATHER ET AL., *supra* note 3, at 98 (finding that lawyers repeatedly asked clients to reconsider settlement offers that might sell them short); KRITZER, RISK, REPUTATIONS, AND REWARDS, *supra* note 151, at 158-59 (finding that lawyers did not grab offers minimally acceptable to their clients, but instead pushed the opposing side).

205. *See* KRITZER, LET’S MAKE A DEAL, *supra* note 164, at 64, 99-100, 123; MNOOKIN ET AL., *supra* note 132; DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO’S IN CHARGE? 115 (1974); AUSTIN SARAT & WILLIAM L. F. FELSTINER, DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS 110 (1995); Lederman & Hrun, *supra* note 188, at 1244; Nolan-Haley, *supra* note 108, at 1381; Relis, *supra* note 108, at 706, 734, 742-43; Riskin & Welsh, *supra* note 31, at 896; Sternlight, *supra* note 56, at 318, 320-28. Studies of lawyers’ interactions with clients during the course of litigation find that lawyers shape and reframe their clients’ expectations and goals and use many strategies to persuade their clients to accept their recommendations. *See* KRITZER, *supra* note 151, at 119-28, 170-76; MACCOBY & MNOOKIN, *supra* note 154, at 109 (finding that parents who said they wanted sole custody were nonetheless more likely to request joint legal custody when they had a lawyer than when they did not); MACFARLANE, *supra* note 61, at 61; MATHER ET AL., *supra* note 3, at 96-99; ROSENTHAL, *supra*, at 109, 111; SARAT & FELSTINER, *supra*, at 106-11, 122-25; Lynn Mather, *What Do Clients Want? What Do Lawyers Do?* 52 EMORY L.J. 1065, 1070 (2003); Relis, *supra* note 108, at 734-41; Sternlight, *supra* note 56, at 318. *But see* Relis, *supra* note 108, at 706, 727, 734-37, 740-42 (finding that although over time some plaintiffs talked less about non-monetary aims and came to see money as a way to express those aims, plaintiffs nonetheless retained non-monetary objectives even after years in litigation). Seeking to transform non-monetary disputes into monetary terms might be particularly likely when lawyers have a contingency fee arrangement. *See, e.g.*, KRITZER, LET’S MAKE A DEAL, *supra* note 164, at 21-24, 45-46.

206. *See, e.g.*, ABA MODEL DIVORCE MEDIATION STANDARDS, *supra* note 60, §§ XI, 25.4 (“[A] family mediator shall suspend or terminate the mediation process” when “the participants are about to enter into an agreement that the mediator reasonably believes to be unconscionable.”); *see also* NAT’L STANDARDS, *supra* note 17, § 8.1.f & cmts.; ROBERT A. BARUCH BUSH, THE DILEMMAS OF MEDIATION PRACTICE: A STUDY OF ETHICAL DILEMMAS

mediators are permitted or required to take these actions, and do so effectively, lack of representation might have a reduced effect on mediation outcomes, or at least egregiously unfair settlements might be prevented.²⁰⁷

The effect of representation on parties' assessments of the agreement reached in mediation varied across studies. In the present study of domestic relations mediation, representation was not related to parties' satisfaction with the agreement or to their views that the agreement was evenly balanced.²⁰⁸ A study of EEO mediation also found no relationship between representation and parties' satisfaction with the mediated outcome.²⁰⁹ A study of special education mediation, however, found that parents who were unrepresented or who had a lay advocate in mediation thought the mediated agreement was less fair than did parents who had a lawyer in mediation.²¹⁰ Perhaps the latter study found differences because the parties completed the questionnaire after more time had passed since mediation (*i.e.*, from one to twenty months later rather than at the end of the session, as in the domestic relations study),²¹¹ giving them more time to reflect on the agreement.²¹² Or perhaps the impact of having a lawyer was greater in this context because the opposing party was always represented by a lawyer,²¹³ which was less often the case in other mediation contexts. Importantly, parties who thought their representative (lawyer or lay advocate)

AND POLICY IMPLICATIONS 13-19 (1992); Lande, *supra* note 11, at 878; McEwen et al., *supra* note 2, at 1332-33, 1397-98, 1405-06; Nolan-Haley, *supra* note 17, at 811, 836.

207. See McEwen et al., *supra* note 2, at 1333-34, 1391.

208. This was true when looking at the individual and the combined representational status of the parties. Most parties who settled were satisfied with the final outcome of mediation (83%) and felt the agreement was pretty evenly balanced (77%). All parties who said the outcome was not balanced thought it favored them; none thought it favored the other side.

209. Varma & Stallworth, *supra* note 84, at 402-03. The mean ratings were 3.27 and 3.24 for unrepresented and represented parties, respectively. The authors did not report statistical significance tests, but this is unlikely to be a true difference.

210. Kuriloff & Goldberg, *supra* note 53, at 55.

211. *Id.* at 45 n.59. There was an additional methodological difference, namely, the use of a scale comprised of fifteen items about the agreement, some of which might have tapped different aspects of parties' views of the agreement and, thus, might have produced different responses than the single measures of outcome fairness used in other studies. The scale included such items as whether mediation helped the parents get what they wanted for their child, whether the agreement was worth the emotional costs, whether the agreement reflected their child's situation, and whether they felt pressured to settle. *Id.* at 47-48.

212. See also Hannaford-Agor & Mott, *supra* note 4, at 179-80 (suggesting that it might be better to examine parties' assessments of the outcomes at some time after resolution); Dean G. Pruitt, *Process and Outcome in Community Mediation*, 11 NEGOTIATION. J. 365, 373 (1995) (finding no relationship between parties' satisfaction immediately after mediation and several months later).

213. Kuriloff & Goldberg, *supra* note 53, at 56.

was more “effective” thought the agreement reached was more fair.²¹⁴ This latter finding suggests that characteristics of the representatives or how they conducted their representation might affect parties’ assessments of mediation outcomes.

It is difficult to interpret findings regarding the effect of representation on parties’ satisfaction with the agreement without knowing something about the nature of the settlement proposals that were exchanged and the relative rate at which parties in the different representational groups accepted or rejected those proposals. The lack of differences in parties’ satisfaction with the agreement could indicate that unrepresented parties were as likely as represented parties to detect and reject unfair proposals, so that the final agreements reached by both groups were equally fair. But the lack of differences in party satisfaction could instead mask actual differences in the final agreements if unrepresented parties were unable to accurately assess the fairness of proposals and accepted “objectively unfair” proposals they viewed as fair,²¹⁵ while represented parties accepted only “objectively fair” proposals as a result of their lawyers’ advice. Also, more favorable ratings by represented parties could reflect either that they obtained better agreements, or that their lawyers lowered their expectations and convinced them the agreements were good.²¹⁶ Or more favorable ratings by represented parties could reflect that criteria other than fairness, such as economic pressures and the need to end the case quickly, played a smaller role in their decisions to accept a proposed settlement than they did for unrepresented parties.²¹⁷ Parties in the present general civil mediation study rated the agreement as *less* fair than their lawyers did,²¹⁸ which suggests that parties did not over-rate the fairness of agreements and were not persuaded to share their lawyers’ views.

214. This was true both for parents ($r = .38$) and for school officials ($r = .49$). *Id.* at 57. See *supra* note 100 for a description of the “effectiveness” scale.

215. See, e.g., Tyler, *supra* note 88.

216. See, e.g., KRITZER, RISK, REPUTATIONS, AND REWARDS, *supra* note 151, at 120-72; SARAT & FELSTINER, *supra* note 205, at 111; David Luban, *The Quality of Justice*, 66 DENV. U. L. REV. 381, 405-06 (1989); Sternlight, *supra* note 56, at 318. Some evidence suggests that it is unlikely that lawyers are able to convince clients that agreements satisfy their objectives when they in fact do not. See, e.g., Relis, *supra* note 108, at 706, 727, 734-35; Riskin & Welsh, *supra* note 31, at 882.

217. Several studies have found that other factors and pressures, such as the inability to afford added delay or costs, risk preferences, and impatience to finalize the divorce or the lack of emotional stamina to hold out, were more important in parties’ decisions to settle than were considerations of fairness. See, e.g., KRITZER, LET’S MAKE A DEAL, *supra* note 164, at 137-38; Erlanger et al., *supra* note 102, at 585, 592, 594, 600; MACFARLANE, *supra* note 61, at 220; MNOOKIN ET AL., *supra* note 132, at 100-01, 106.

218. Wissler, *Court-Connected Mediation*, *supra* note 32, at 667.

Two studies examined more “objective” outcome measures. One study found that represented parties in housing court mediation were more likely than unrepresented parties to have the eviction “unconditionally or temporarily denied subject to a probationary period” and to get more time to look for another place to live.²¹⁹ The second study found that settlements in EEO mediation involved smaller dollar amounts when charging parties were unrepresented than when they were represented by a lawyer or other person, but found no differences in settlement amounts depending on whether responding parties were represented or unrepresented.²²⁰

There are several reasons why it is impossible to draw conclusions about the effect of representation on settlement outcomes by looking only at the absolute dollar amount of the settlement, as in the latter study. First, without taking into consideration the charging parties’ claim or the amount in dispute,²²¹ one cannot tell whether smaller settlement amounts simply reflect smaller underlying claims, or whether the settlements in fact comprise a smaller proportion of the claimed or disputed amount.²²² Second, focusing only on dollar amounts overlooks the non-monetary objectives and settlement provisions that are present in a substantial proportion of cases,²²³

219. Dolloff & Rossi, *supra* note 203, at 14. It is not clear whether the outcome data reported involved only mediated agreements, which is how most cases were resolved, or also included trial judgments. *Id.* at 12.

220. E. Patrick McDermott & Ruth Obar, “What’s Going On” in Mediation: An Empirical Analysis of the Influence of a Mediator’s Style on Party Satisfaction and Monetary Benefit, 9 HARV. NEGOT. L. REV. 75, 102-05 (2004). These findings are based on questionnaires completed by mediators and parties in 645 cases following mediation conducted under the supervision of the fifty EEOC field offices during a five-month period in 2000. *Id.* at 90-92. The study did not distinguish among different types of representatives, did not examine the effect of the combined representational status of both parties, and did not take into consideration non-monetary settlement provisions. *Id.* at 101 n.109.

221. See, e.g., KRITZER, JUSTICE BROKER, *supra* note 3, at 143-44, 147, 149 (noting that “success should be evaluated in terms of what is really at stake,” namely, the amount in dispute); Lederman & Hrung, *supra* note 188, at 1239 (using the proportion of tax at issue that was recovered by the IRS as the measure of “financial outcome”). See generally Neil Vidmar, *The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation*, 18 LAW & SOC’Y REV. 151 (1984) (arguing that outcomes must be assessed relative to the amount in dispute, which takes into consideration both the amount of the plaintiff’s claim and the amount, if any, for which the respondent acknowledges liability).

222. Non-monetary outcomes also need to be assessed relative to what the parties were seeking. For instance, it is not surprising that joint legal custody was more likely to be the outcome when at least one party had a lawyer, given that represented parties were more likely to request joint legal custody than were unrepresented parties. See MACCOBY & MNOOKIN, *supra* note 154. That study also illustrated why the outcome needs to be assessed in the context of what *both* sides are seeking (which is comparable to the “amount in dispute”): parties were more likely to get the custody outcome they wanted when the other party did not contest it than when they did. *Id.* at 103-04.

223. See McEWEN, *supra* note 49, at 52, 55; Wissler, *supra* note 32, at 667; Bingham et al., *supra* note 51, at 372-73; Relis, *supra* note 108, at 702, 725.

and thus can give a misleading picture of the outcome. For parties primarily interested in non-monetary remedies, even a substantial monetary outcome might not be seen as satisfactory;²²⁴ they might prefer no money or a smaller monetary settlement in exchange for key non-monetary settlement provisions. Importantly, both the size of the initial claim and whether it includes non-monetary components are likely to be confounded with representational status: parties with less money at issue and parties with primarily non-monetary goals are less likely to seek or to be able to hire a lawyer.²²⁵ Accordingly, unrepresented parties might attain smaller monetary settlements as a result of their underlying claims and goals rather than their lack of representation.²²⁶

Examining the content of agreements “objectively” presents additional challenges of what standard to apply to evaluate the outcome. Studies find great variability among lawyers in the “objectively proper” monetary value they assign to the same case.²²⁷ And when parties’ objectives and agreements involve non-monetary components or encompass a number of issues of varying importance, it can be especially difficult to evaluate how favorable or fair the outcome is for each party.²²⁸

This discussion illustrates the difficulty of examining the effect of representation on mediation outcomes, whether using parties’ assessments of the agreement or the agreements themselves. This is particularly true given the variation in parties’ objectives and the considerations that influence their decisions to accept or reject settlement proposals, and the confounding of those objectives and considerations with representational status.

CONCLUSION

The available empirical research findings suggest that the problems unrepresented parties face in mediation, or conversely, the benefits of having counsel, might not be as great as some claim. For the most part, unrepresented parties do not see the mediation process as less fair, the mediator as

224. See, e.g., Riskin & Welsh, *supra* note 31, at 880-82.

225. See, e.g., KRITZER, LET’S MAKE A DEAL, *supra* note 164, at 102, 155 (finding that contingency fee lawyers were unlikely to take cases with a likely non-monetary outcome); KRITZER, RISK, REPUTATIONS, AND REWARDS, *supra* note 151, at 84-85 (noting that low damages or inadequate fee potential was a major reason lawyers declined to take cases).

226. See Monsma & Lempert, *supra* note 94, at 630, 642.

227. See, e.g., NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY 234-35 (1995); Marc Galanter, *The Quality of Settlements*, 1988 J. DISP. RESOL. 55, 76-77; Neil Vidmar & Jeffrey J. Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 IOWA L. REV. 883, 898, 901 (1993).

228. See generally Engler, *supra* note 5. See also Hannaford-Agor & Mott, *supra* note 4, at 178-79.

less impartial, the pressure to settle as greater, or the settlement as less fair than do represented parties. Studies that find differences in parties' assessments of the fairness of the mediation process do not find a consistent pattern of unrepresented parties viewing the process either as less fair or more fair than parties with lawyers. Although greater party preparation is associated with settlement and more favorable assessments of mediation, this presumed advantage of representation often is not attained because lawyers do not routinely prepare their clients for mediation. However, there is some evidence that represented parties might obtain better outcomes than unrepresented parties, though the research highlights the challenge of defining "better" outcomes, especially in light of widely varying party goals.

The research also suggests that lawyers' presence in mediation might not create some of the problems feared. Lawyers do not appear to be associated with more contentious mediation sessions or with more limited discussions of feelings or settlement options. Representation is not consistently associated with parties feeling that they have fewer opportunities to express their views. However, how much parties participate in mediation or how satisfied they are with their level of participation generally is lower when parties have a lawyer in mediation, and there is somewhat less improvement in represented parties' understanding of the other side's views. In addition, lawyers' presence in mediation generally is associated with a lower rate of settlement, although that appears to be due as much or more to the effect of case characteristics associated with representation than to any impact lawyers might have on the mediation process.

Existing empirical research, however, is too limited in several respects to be able to conclude that lawyers either play an essential role in mediation or are not needed, or that they are particularly helpful or detrimental to the mediation process. First, the findings are based on a small number of mediation programs in a few contexts. Mediation programs for different types of cases and in different jurisdictions differ in many ways, including the characteristics of the parties, the characteristics of the mediators, the model or style of mediation, whether mediation is voluntary or mandatory, the typical length and number of mediation sessions, and the legal context and local legal culture within which they operate.²²⁹ There also are differences

229. See *supra* Part I.A; *supra* note 91. See, e.g., Craig McEwen, *Examining Mediation in Context: Toward Understanding Variations in Mediation Programs*, in THE BLACKWELL HANDBOOK OF MEDIATION: BRIDGING THEORY, RESEARCH, AND PRACTICE 81, 87-91 (Margaret S. Herrman ed., 2006) [hereinafter *Mediation Context*]; Macfarlane, *supra* note 74, at 250-51, 313-16; McEwen et al., *supra* note 2, at 1353, 1362; Craig A. McEwen, *Toward a Program-Based ADR Research Agenda*, 15 NEGOTIATION J. 325, 331-33 (1999) [hereinafter *Research Agenda*]; Wissler, *supra* note 11, at 56-57, 62-64, 71-72.

across mediation contexts and jurisdictions in lawyers' views of the mediation process, the appropriate role of lawyers, and the types of issues and solutions relevant for discussion. These views influence how lawyers "use" mediation and how they represent clients during mediation.²³⁰ Any of these differences in the nature of "mediation" or "representation" in other mediation programs and contexts could produce different effects on parties' mediation experience and outcomes.²³¹

Second, studies to date have examined only a small number of measures, some of which are at a relatively general level or assess effects indirectly. Systematic observations of mediation sessions and measures that assess in more detail the content and tone of the discussions as well as the nature of party and lawyer participation during mediation might find that there are additional differences associated with the presence of lawyers.²³² Third, some of the apparent effects of representation might instead reflect underlying party or case characteristics associated with seeking and being able to obtain representation.²³³ Ultimately, the random assignment of lawyers to parties is needed to be able to address these confounds. Increasing the availability of volunteer lawyers or providing counsel at public expense could supply an opportunity for random assignment of lawyers to parties that would not otherwise exist: if there are not enough lawyers for all unrepresented parties, lawyers could be randomly assigned to some parties but not others.²³⁴

Fourth, most of the studies are based on mediation sessions that took place a decade or more ago. Since then, lawyers are likely to have had more experience representing clients in mediation and possibly have had more training in mediation advocacy.²³⁵ Several studies suggest that lawyers who have more experience as counsel in mediation approach the process differently than lawyers with less experience: they tend to prepare their clients more, have a broader conception of relevant issues and options,

230. See *supra* note 94 and accompanying text. See, e.g., *Mediation Context*, *supra* note 229, at 88-89; Macfarlane *supra* note 74, at 250-51, 270-76, 315-18.

231. See *supra* notes 96, 117, 159-66 and accompanying text.

232. See, e.g., Relis, *supra* note 108, at 725-27, 733-34, 742-43; Riskin & Welsh, *supra* note 31, at 864-66, 871-76, 894-97.

233. See *supra* notes 188-91, 200 and accompanying text.

234. See Seron et al., *supra* note 2, at 423-25 (describing how unrepresented parties in housing court cases, who met federal poverty guidelines and were interested in having legal representation, were randomly assigned either to receive assistance from a volunteer lawyer or were told that it was not possible to provide a lawyer).

235. See, e.g., Suzanne J. Schmitz, *What Should We Teach in ADR Courses?: Concepts and Skills for Lawyers Representing Clients in Mediation*, 6 HARV. NEGOT. L. REV. 189, 206-10 (2001) (noting the need for more training in law school focused on representing clients in mediation rather than being the mediator); Welsh, *supra* note 80, at 24.

have greater comfort with and appreciation of client involvement, and adopt a less adversarial and more problem-solving approach during the session.²³⁶ Other evidence, however, suggests that lawyers have become more adversarial in bilateral negotiation over the past several decades,²³⁷ and that some lawyers might use their increased familiarity with mediation to engage in strategic behavior during mediation.²³⁸ Some parties might also have gained familiarity or experience with mediation, and as a result they might have different expectations of the mediation process and of their lawyers than they would have had a decade ago. In some settings, the mediators' approach and the mediation process might have been "transformed" over time to accommodate lawyers' preferences.²³⁹ Accordingly, compared to prior studies, research conducted today might find different effects of representation in some or all mediation contexts or might find divergence in the effects of representation among different subgroups of lawyers.

An important additional area for future research is examining the effect of *how* representation is carried out.²⁴⁰ Existing research suggests that the effect that "representation" has on parties' assessments of mediation and on the likelihood of settlement varies with the nature of that representation, including how much lawyers prepare their clients for mediation and how cooperative lawyers are during mediation. Research needs to examine what other components of representation make a difference to parties' mediation experience and what specific elements of each component contribute to its effects. Understanding more about what lawyers do when representing clients in mediation, and how that enhances or detracts from the parties' mediation experience, will provide guidance on how to improve the effectiveness of representation in mediation.

In particular, additional research needs to examine how to structure and balance the participation of lawyers and parties to ensure that parties feel they have the chance to fully express their views. Virtually all parties who participate a great deal in mediation feel they have considerable chance to express their views. Among parties who do not participate at all, a substantial number nonetheless feel that they have a chance to express their views, but not all do. This suggests that parties can feel they have voice through

236. See Macfarlane, *supra* note 74, at 274, 276, 295, 297, 300, 320; McEwen et al., *supra* note 2, at 1367-78.

237. See Schneider & Mills, *supra* note 94, at 613.

238. See Macfarlane, *supra* note 74, at 256-57.

239. See, e.g., Golann, *supra* note 117; Lande, *supra* note 11, at 885; Welsh, *supra* note 107, at 797-98.

240. See, e.g., *Research Agenda*, *supra* note 229, at 329 (stressing the need to document what "the intervention" [here, representation] actually is in order to understand its effects).

their lawyers, and that it might be something about the way in which their lawyers represent them in mediation that affects their sense of voice. Parties who feel they have more opportunities to express their views are more likely to think the process and outcome are fair than are parties who do not feel they have a chance to express their views. Studies need to examine what it is that lawyers can do to facilitate parties' participation and to ensure that parties feel their views are expressed, even if they choose not to participate. Ultimately, future research that examines the ways in which representation in mediation can be conducted most effectively, as well as the circumstances under which parties might be unable to represent themselves in mediation, is likely to provide more useful information than studies that examine the effect of representation more broadly.²⁴¹

241. *Id.* For a discussion of standards or tests for determining competency to self-represent in mediation, see GREACEN, *supra* note 2, at 8-9; Connie J. A. Beck & Lynda E. Frost, *Defining a Threshold for Client Competence to Participate in Divorce Mediation*, 12 PSYCHOL. PUB. POL'Y & L. 1, 25-29, 35 (2006).